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The Constitutionality of Punitive Damges in Libel Actions

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THE CONSTITUTIONALITY OF PUNITIVE DAMAGES IN LIBEL ACTIONS

The task of rewriting libel law which the Supreme Court began in *New York Times Co. v. Sullivan*[1] has continued for more than a decade, but the fundamental premise remains the same—that libel law is incompatible[2] with the guarantees of the first amendment. The Court concluded in *New York Times* that the fear of libel suits induced self-censorship among publishers and therefore had a "chilling effect" on the free expression of diverse opinion.[3] To counteract the chilling effect the Court has adopted what has become the *New York Times* "actual malice" rule: public figures and public officials cannot recover damages for libel without proving the statement was made with either knowledge it was false or reckless disregard of whether it was false or not.[4] The media's protection from suits by other plaintiffs, those classified as private figures, has been consistently less extensive.[5]

The Court has assessed the chilling effect of different aspects of the law of libel, such as the standard of care[6] and the various types of dam-

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1. 376 U.S. 254 (1964). The Supreme Court's frequent and extensive revisions of libel laws which previously had been within the exclusive domain of the states, have sometimes prompted adverse criticism. E.g., El Meson Espanol v. NYM Corp., 389 F. Supp. 357, 358-59 (S.D.N.Y. 1974), aff'd, 521 F.2d 737 (2d Cir. 1975).

2. The Court has been unable to resolve this conflict, and instead has attempted to balance the conflicting interests involved. "Nothing is more characteristic of the law of the First Amendment—not the rhetoric, but the actual law of it—than the Supreme Court's resourceful efforts to cushion rather than resolve clashes between the First Amendment and interests conflicting with it." A. Bickel, The Morality of Consent 78 (1975).

3. 376 U.S. at 277-80. The assumption that libel law is incompatible with the first amendment runs through all of the post-New York Times cases and is seldom questioned. But see Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 76 n.5 (1971) (Harlan, J., dissenting).

4. 376 U.S. at 279-80 (public official). This test was later extended to public figure cases. Gertz v. Robert Welch, Inc., 418 U.S. 323, 336-37 & n.7 (1974).

5. See, e.g., Time, Inc. v. Firestone, 424 U.S. 448, 486 (1976) (Marshall, J., dissenting) ("public figures are less deserving of protection than private figures"); Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) ("private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.").

6. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), where the Court enunciated a different standard of care for cases brought by public figures, based on "a showing of highly unreasonable conduct" inconsistent with "the standards of investigation and reporting ordinarily adhered to by responsible publishers." Id. at 155. This approach has been abandoned, and actual malice is now the standard of care in both public official and public figure cases. Gertz v. Robert Welch, Inc., 418 U.S. 323, 334-35 & n.6 (1974). The Court in Gertz held that in private figure cases the states could establish their own standards of care. Id. at 347. The state courts have reached varied results. Some have adopted a negligence standard. E.g., General Motors Corp v. Piskor, 277 Md. 165, 171-72, 352 A.2d 810, 814-15 (1976). Others have adopted the actual malice standard. E.g., Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 98-99, 538 P.2d 450, 457, cert. denied, 423 U.S. 1025 (1975) (en banc). The New York Court of Appeals has revived the Butts standard with a few modifications. Compare Curtis Publishing Co. v. Butts, 388 U.S. 130,

ages.[7] When it found the chilling effect of any aspect outweighed the state's interest in providing a remedy for its defamed citizens the Court did not hesitate to rewrite the common law.[8] A minority of the Court has argued that the chilling effect of punitive damages is so great that they can never be awarded consistently with the guarantee of freedom of the press.[9] Although the full Court has adopted the reasoning of the minority,[10] it has done so only in a limited context.[11] It has declared punitive damages are unconstitutional "at least" in suits by private figures who have not satisfied the *New York Times* test.[12]

This Comment will examine the effect which each function of punitive damages has on first amendment freedoms. It will attempt to resolve the

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155 (1967) with Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975).

7. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130, 159-61 (1967); see notes 34-62 infra and accompanying text.

8. The Court applied a balancing of interests approach familiar to other areas of constitutional law. The approach requires that when a state interest infringes on constitutional rights the state must seek a less restrictive means of accomplishing its ends. Note, The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification and Some Criteria, 27 Vand. L. Rev. 971, 972, 1011-16 (1974). See Drotzmanns, Inc. v. McGraw-Hill, Inc., 500 F.2d 830, 835-36 (8th Cir. 1974); 28 Vand. L. Rev. 887, 896 (1975). The most protection the Court has given the media was in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971), where a plurality of justices held the actual malice standard was applicable for defamation arising out of "all discussion and communication involving matters of public or general concern." Id. at 44. The Court later retreated from this position. See Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

9. See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 72-78 (1971) (Harlan, J., dissenting); id. at 78-87 (Marshall, J., dissenting).

10. See note 46 infra.

11. Considerable speculation has been given to the question of what the ultimate constitutional status of punitive damages will be. See Buckley v. Littell, 539 F.2d 882, 897 (2d Cir. 1976), cert. denied, 97 S. Ct. 785 (1977); Appleyard v. Transamerican Press, Inc., 539 F.2d 1026, 1029-30 (4th Cir. 1976), cert. denied, 97 S. Ct. 740 (1977); Davis v. Schuchat, 510 F.2d 731, 737 (D.C. Cir. 1975); Fopay v. Noveroske, 31 Ill. App. 3d 182, 197, 334 N.E.2d 79, 91-92 (1975); Restatement (Second) of Torts, Explanatory Notes § 621, comment f, at 288 (Tent. Draft No. 20, 1974); Arkin & Granquist, The Presumption of General Damages in the Law of Constitutional Libel, 68 Colum. L. Rev. 1482, 1484 n.17 (1968) [hereinafter cited as Arkin & Granquist]; Robertson, Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc., 54 Texas L. Rev. 199, 215 (1976) [hereinafter cited as Robertson]; Slough, Swift Currents of Change In The Law of Defamation, 45 J. Kan. B.A. 17, 20 (1976); Note, Punitive Damages in Defamation Litigation: A Clear and Present Danger to Freedom of Speech, 64 Yale L.J. 610, 612-15 (1955) [hereinafter cited as Punitive Damages]; 6 Cumb. L. Rev. 267, 274 (1975); 29 Vand. L. Rev. 870, 896 (1976); 2 Western St. U.L. Rev. 305, 317 (1975); 78 W. Va. L. Rev. 247, 257 (1976).

12. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974). Gertz apparently left the common law unchanged in other respects, so punitive damages may still be awarded in public figure cases and in private figure cases where actual malice is shown. See Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349, 1439-41 (1975) [hereinafter cited as Eaton].

conflicting arguments over the constitutionality of punitive damages. Central to those arguments is the question of whether the *New York Times* standard provides the media with sufficient protection from punitive damages. It will be suggested that there is sufficient protection in private figure cases, but not in public figure and public official cases where the interest in encouraging free debate on public issues is higher.[13] Consequently, it will be suggested that punitive damages are unconstitutional in the latter case under ordinary circumstances.

The problems which punitive damages present to small and specialized media will also be examined. The chilling effect of such damages on small media is especially great, because one large award could literally destroy a small publisher's business. Some small media, such as partisan political newspapers or the journals published by the leaders of social movements, offer a diversity of opinion not always found in the mass audience media.[14] Therefore the first amendment policy of encouraging the circulation of different viewpoints should require special efforts to protect small media from the chilling effects of punitive damages.

The competing interests involved in punitive damage libel cases may be balanced in the following ways, which will be developed below: (1) by continuing the present rules for recovery of punitive damages by private figures; (2) by imposing a requirement of proof of actual injury in all other cases to prevent a jury from using compensatory damages as punishment; (3) by severely restricting the award of punitive damages to public figures and public officials by the imposition of an additional requirement of intent to injure; and (4) by defining public figures with respect to the circulation and

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13. See St. Amant v. Thompson, 390 U.S. 727, 731-32 (1968) ("But New York Times and succeeding cases have emphasized that the stake of the people in . . . the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies."); New York Times Co. v. Sullivan, 376 U.S. 254 (1964): "For good reason, 'no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.' " Id. at 291, quoting Chicago v. Tribune Co., 307 Ill. 595, 601, 139 N.E. 86, 88 (1923).

14. An examination of the titles of the articles and programs in the following small media outlets suggests they would not be given any extended consideration in the mass media, although the ideas might be of central concern to some segments of the population. Spannaus, Toward a Capitalist-Marxist Alliance for Industrial Growth, New Solidarity, Mar. 4, 1977, at 7, col. 1 (socialist labor newspaper); Revelations of a Gay Informant, Advocate, Feb. 23, 1977, at 12, col. 1 (gay liberation movement newspaper); Arizonans Fear Navajo Vote, Akwesasne Notes, Late Autumn, 1976, at 15, col. 1 (American Indian movement newspaper); Glimpses of Women's Liberation in Vietnam, Majority Report, Mar. 5, 1977, at 1, col. 1 (feminist newspaper); S-1 [criminal code reform bill] Still Threatens Civil Liberties, Socialist Republic, Winter 1976-77, at 4, col. 1 (political newsletter); Summer Writing Course with Allan Ginsberg, WBAI Folio, Dec. 13, 1976, at 3, col. 1 (program announcements for listener sponsored FM radio); FBI Infiltrates Feminist Groups, Women and Revolution, Summer, 1976, at 21, col. 1 (Spartacist League journal); The Marijuana Monopoly, Cannabis Cartel Seizes Control, Yipster Times, March-April, 1977, at 7, col. 1 (anarchist newspaper).

subject matter of the media outlet to maximize the protection to small media defendants.

I. LIBEL DAMAGES AND THEIR FUNCTIONS

A. *Traditional Libel Damages*

At common law there are three types of damages available for libel: general, special and punitive.[15] It is an "oddity of tort law"[16] that general damages are awarded without proof of actual injury.[17] Damage is *presumed* to flow from the defamation, and general damages are awarded merely upon showing publication of a statement falling into one of the categories considered defamatory *per se*.[18] For other libels, special damages of a pecuniary nature must be proved. Once such special damages are established, however, the plaintiff becomes eligible to recover for other nonpecuniary injury such as humiliation, mental suffering or loss of companionship.[19] Generally, punitive damages can be awarded in addition to general or special damages upon a showing of malice in the common-law sense of spite, ill will or intent to injure plaintiff.[20] Some jurisdictions require proof of actual injury before punitive damages can be awarded.[21] Other courts condition an award of punitive damages only upon a finding of nominal damages,[22] and cases can be found where punitive damages alone were awarded without even a pretense of first finding actual harm.[23] It has been suggested that the amount of punitive damages must bear a reasonable relationship to the actual damages.[24] But it

15. See W. Prosser, Handbook of the Law of Torts § 112 (4th ed. 1971) [hereinafter cited as Prosser].

16. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

17. Prosser, supra note 15, § 112, at 762. Presumed damages are exceedingly rare in tort law, being found additionally only in trespass to land. See Restatement (Second) of Torts § 163 (1965). Shortly after New York Times, some commentators began to suggest presumed damages in libel were unconstitutional. Arkin & Granquist, supra note 11, at 1488-93.

18. Prosser, supra note 15, § 112, at 762. Libel was actionable per se if the defamatory statement imputed a crime, a loathsome disease, unchastity in a woman or affected the plaintiff in his business or occupation. Id. at 763.

19. Id. at 760-61.

20. See Cantrell v. Forest City Publishing Co., 419 U.S. 245, 251-52 (1974); Gertz v. Robert Welch, Inc., 418 U.S. 323, 373 (1974) (White, J., dissenting); Prosser, supra note 15, § 112, at 772.

21. Punitive Damages, supra note 11, at 614 n.28; cf. Note, Developments in the Law—Damages, 1935-1947, 61 Harv. L. Rev. 113, 120 (1947) [hereinafter cited as Developments].

22. E.g., Goldwater v. Ginzburg, 414 F.2d 324, 340 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970) (one dollar compensatory damages awarded).

23. E.g., Newspaper Publishing Corp. v. Burke, 216 Va. 800, 805, 224 S.E.2d 132, 136 (1976) (no compensatory damages and $10,000 punitive damages); Garza v. San Antonio Light, 531 S.W.2d 926, 927 (Tex. Civ. App. 1975) (jury's verdict read "none" for general damages and $25,000 for exemplary damages); Kent v. City of Buffalo, 61 Misc. 2d 142, 144, 304 N.Y.S.2d 949, 952 (Sup. Ct. 1969); Tunnell v. Edwardsville Intelligencer, Inc., 99 Ill. App. 2d 1, 9-10, 241 N.E.2d 28, 32 (1968), cert. denied, 397 U.S. 1021 (1970).

24. E.g., Crowell-Collier Publishing Co. v. Caldwell, 170 F.2d 941, 944 (5th Cir. 1948); Thompson v. Mutual Ben. Health & Acc. Ass'n, 83 F. Supp. 656, 661 (N.D. Iowa 1949).

is common to find cases in which juries have awarded tens of thousands of dollars in punitive damages where little or no actual damages were proven.[25]

B. *Functions of Punitive Damages*

Much of the confusion surrounding punitive damages stems from the fact that they are awarded for different purposes in different cases. The most common purposes are deterrence, retribution and compensation.[26]

1. Deterrence

Courts have discussed the issue of punitive damages in libel actions almost exclusively in terms of their deterrent function.[27] Before punitive damages can be justified as a deterrent, however, it must appear that the compensatory damages are not already so large as to fulfill the same function.[28] It must also be shown that the defendant will be effectively deterred by the award,[29] and for this reason evidence of defendant's wealth is usually admitted in a libel action.[30]

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25. See Goldwater v. Ginzburg, 414 F.2d 324, 340 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970); Saunders Hardware Five and Ten, Inc. v. Low, 307 So. 2d 893, 894 (Fla. Dist. Ct. App. 1974) (per curiam); Dalton v. Meister, 52 Wis. 2d 173, 179-80, 188 N.W.2d 494, 497-98 (1971), cert. denied, 405 U.S. 934 (1972) ($75,000 punitive and $75,000 compensatory damages with no proof of injury). See also AG-Chem Equip. Co. v. Hanh, Inc., 480 F.2d 482, 491-92 (8th Cir. 1973).

26. Comment, Punitive Damages Under Federal Statutes: A Functional Analysis, 60 Calif. L. Rev. 191, 192 (1972) [hereinafter cited as Federal Statutes]; see Developments, supra note 21, at 119-20.

27. Deterrence is probably the most compelling justification for punitive damages. See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 73-76 (1971) (Harlan, J., dissenting). Punitive damages in civil actions fill a void by deterring anti-social conduct which is not serious enough to be punished criminally. See Exemplary Damages in the Law of Torts, 70 Harv. L. Rev 517, 523 (1957) [hereinafter cited as Exemplary Damages]. It is noteworthy, however, that the question of whether punishment is a successful deterrent is still being debated in the criminal law. See, e.g., Criminal Law and Its Processes 26-33 (3d ed. S. Kadish & M. Paulsen ed. 1975).

28. See Federal Statutes, supra note 26, at 214-215. In libel actions it can be argued that the threat of compensatory damages and litigation expenses alone is sufficient to deter the publication of defamatory falsehoods. See Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C Cir. 1966), cert. denied, 385 U.S. 1011 (1967); Maheu v. Hughes Tool Co., 384 F. Supp. 166, 170 (C.D. Cal. 1974); cf. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 84-85 (1971) (Marshall, J. dissenting).

29. Federal Statutes, supra note 26, at 213. There is evidence that newspaper publishers are greatly concerned about the threat of libel judgments. See Editor & Publisher, May 10, 1975, at 66; Editor & Publisher, Nov. 2, 1974, at 11.

30. Fopay v. Noveroske, 31 Ill. App. 3d 182, 199-201, 334 N.E.2d 79, 93-95 (1975); Peisner v. Detroit Free Press, 68 Mich. App. 360, 368, 242 N.W.2d 775, 779 (1976); Neigel v. Seaboard Fin. Co., 68 N.J. Super. 542, 555, 173 A.2d 300, 307 (1961). The theory is that the jury has to know something about the defendant's bank account before it can calculate a punitive award with any value as a deterrent. Roemer v. Retail Credit Co., 44 Cal. App. 3d 926, 937 & n.5, 119 Cal. Rptr. 82, 89 & n.5 (1st Dist. 1975).

There is a fundamental conflict between the policy of awarding punitive damages as a deterrent and the policy of media protection developed in *New York Times* and the cases which followed it.[31] Under the policy of deterrence, the law punishes one publisher of libel so others will refrain from publishing similar defamatory statements and will take extra care to ensure what they publish is not libelous.The policy running through the cases following *New York Times*, however, is that the threat of punishment through libel suits must be minimized[32] to ensure the free exchange of "diverse and antagonistic" ideas that the first amendment was designed to promote.[33]

The Supreme Court first considered the constitutionality of punitive damages and their deterrent effect in *Curtis Publishing Co. v. Butts*.[34] A jury had awarded three million dollars in punitive damages against a nationally distributed magazine, and the award had been reduced to $460,000 on remittitur. The defendant argued that the power to award punitive damages gave the jury the power to destroy a publisher's business through excessive awards and was therefore impermissible under the first amendment.[35] Justice Harlan, writing for a plurality of four justices, rejected the argument on the ground that punitive damages serve a "wholly legitimate purpose" of deterring attacks on individual reputation, especially when compensatory damages are too small to act as a deterrent.[36] Justice Harlan wrote that remittitur and other means of judicial supervision over punitive damage awards are adequate protection against infringement on freedom of the press through excessive verdicts.[37] He concluded the Constitution does not require that publishers be exempted from assessments generally levied on other members of the community.[38] However, *Butts* is the sole case in which the Supreme Court has upheld an award of punitive damages for libel.[39]

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31. See generally Note, Constitutionality of the Law of Criminal Libel, 52 Colum. L. Rev. 521, 533 (1952); cf. Speiser v. Randall, 357 U.S. 513, 518-19 (1958).

32. New York Times Co. v. Sullivan, 376 U.S. 254, 294-95 (1964) (Black, J., concurring).

33. See Associated Press v. United States, 326 U.S. 1, 20 (1945).

34. 388 U.S. 130 (1967).

35. Id. at 159.

36. Id. at 161. Justice Harlan later reiterated this argument in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 73 (1971) (dissenting opinion). He noted that even a large compensatory verdict may not have a deterrent effect if the defendant is unusually wealthy. And in some cases even though the defendant's conduct is both dangerous and morally blameworthy it might fail to result in injury due only to fortuitious circumstances and no conpensatory damages would be awarded. In such a case punitive damages serve society's interest in deterring dangerous conduct where compensatory damages cannot. Id.

37. 388 U.S. at 160. Justice White has also argued that remittitur is a satisfactory check on the jury's discretion in awarding punitive damages. He considered declaring punitive damages unconstitutional "a classic example of judicial overkill." Gertz v. Robert Welch, Inc., 418 U.S. 323, 395-98 (1974) (dissenting opinion). Justice White pointed out that many jurisdictions require punitive damages to bear a reasonable relationship to actual damages and others do not recognize the doctrine of punitive damages at all. Id. at 397.

38. 388 U.S. at 160.

39. Punitive damage verdicts were reversed in two cases. See Letter Carriers Local 496 v.

Justice Marshall was one of the first members of the Court to conclude that the deterrent function of punitive damages renders them unconstitutional. In a dissenting opinion to *Rosenbloom v. Metromedia, Inc.*,[40] he pointed out that punitive damage awards were so arbitrary that they produced self-censorship.[41] The jury in *Rosenbloom* had returned $725,000 in punitive damages based on an award of only $25,000 in general damages. Although there was a reduction to $250,000 on remittitur, Justice Marshall considered it insufficient to cure the arbitrary nature of the award.[42] He argued that "fear of the extensive awards" available to an unsympathetic jury would necessarily curtail a free flow of opinion in the news media and thereby frustrate first amendment policy.[43]

Justice Marshall also noted that punitive damages gave juries a tool to punish unorthodox and unpopular opinions.[44] The full Court expanded upon this objection in *Gertz v. Robert Welch, Inc.*,[45] where it held punitive damages unconstitutional in private figure actions "at least" absent proof of *New York Times* actual malice.[46] The case involved an attorney who had

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Austin, 418 U.S. 264, 269 (1974) ($45,000); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 40 (1971) ($250,000). In thirteen other cases damage verdicts were reversed, but it was not specified if they were punitive or compensatory. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 329 (1974) ($50,000); Monitor Patriot Co. v. Roy, 401 U.S. 265, 270 (1971) ($20,000); St. Amant v. Thompson, 390 U.S. 727, 729 (1968) ($5,000); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967) (per curiam) ($5,000); Rosenblatt v. Baer, 383 U.S. 75, 94 (1966) ($31,500); Henry v. Collins, 380 U.S. 356 (1965) (per curiam); New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964) ($500,000); Barr v. Matteo, 360 U.S. 564 (1959); Washington Post Co. v. Chaloner, 250 U.S. 290, 293 (1919) ($10,000); Baker v. Warner, 231 U.S. 588, 591 (1913) ($10,000); Washington Gas Light Co. v. Lansden, 172 U.S. 534, 535 (1899) ($12,500); Vogel v. Gruaz, 110 U.S. 311 (1884) (slander) ($6,000); Philadelphia, W. & B. R.R. v. Quigley, 62 U.S. 202, 213-14 (1858). In addition, the Court affirmed an $8,500 verdict in Pickford v. Talbott, 211 U.S. 199, 204 (1908), but it did not specify whether it was compensatory or punitive. There is no discussion of punitive damages in the case, although it appears plaintiff's attorney sought such damages. See id. at 208-09.

40. 403 U.S. 29 (1971).

41. 403 U.S. at 84 (dissenting opinion). Some commentators believe punitive damages are the only real threat to publishers. See R. Phelps & E. Hamilton, Libel 358 (1966); cf. Robertson, supra note 11, at 260 n.381.

42. See 403 U.S. at 83 (dissenting opinion).

43. Id. The reluctance of other members of the Court to declare punitive damages unconstitutional in all cases has been due to a belief that they still have value as a deterrent. See notes 56-58 infra and accompanying text. In fact, even as it declared punitive damages unconstitutional in Gertz, the Court acknowledged their deterrent function. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

44. 403 U.S. at 84 (dissenting opinion).

45. 418 U.S. 323 (1974).

46. 418 U.S. at 349. The Court in Gertz attempted to adjust the various elements of libel law in order to accommodate the stifling effects of libel to first amendment policy. Thus, while it reduced the protection to the media by requiring a higher standard of care, Time, Inc. v. Firestone, 424 U.S. 448, 474-75 (1976) (Brennan, J., dissenting), it increased media protection by placing restrictions on the award of damages. 418 U.S. at 348-50.

Under Gertz, state courts may now choose their own standard of care in private figure cases

been falsely labeled a "Leninist" and a "Communist-fronter" by a monthly magazine devoted to unpopular political views.[47] Although there was no proof of actual injury, the jury awarded $50,000 in damages.[48] The Court reversed the award on constitutional grounds, objecting that a jury's wide discretion in calculating the amount of punitive damages gives it the power "selectively to punish expressions of unpopular views."[49]

The Court in *Gertz* applied a balancing of interests analysis, recognizing that since libel law impinges on activities protected by the first amendment it must be supported by an equally compelling state interest in order to withstand constitutional scrutiny. The Court found that a state's interest in compensating its citizens for damaged reputation was sufficient to justify this impingement.[50] But the clear emphasis in the cases has been on *compensation*.[51] *Gertz* found punitive damages serve a purpose "wholly irrelevant" to

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providing they do not impose strict liability. Negligence is thus an acceptable standard. See 418 U.S. at 347-48. A number of state courts, however, have rejected the invitation to adopt negligence on the ground it would not remove the stifling effect of damage awards on the media. See Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 98-99, 538 P.2d 450, 457-58, cert. denied, 423 U.S. 1025 (1975) (en banc); AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580, 585-86 (Ind. App. 1974), cert. denied, 424 U.S. 913 (1976); Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975). It is also noteworthy that prior to Gertz most members of the Supreme Court considered negligence a clearly unacceptable standard in the first amendment area. See Rosenbloom v. Metromedia, Inc., 403 U.S 29, 50, 52-53 (1971); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967). One conclusion to be drawn from this authority is that there is significant dissatisfaction with the adjustments which the Supreme Court made in the law of libel in Gertz. Perhaps the Court should have gone further and declared punitive damages unconstitutional even in cases where actual malice was shown. The opinion in Gertz made exactly the changes which Justice Marshall had suggested in his dissent to Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 86-87 (1971) except for one element—Justice Marshall would have declared punitive damages unconstitutional in all cases, whether actual malice was proved or not.

47. 418 U.S. at 326. The magazine was "American Opinion," the official publication of the John Birch Society. Id. at 325.

48. Id. at 329.

49. Id. at 350. In his dissent, Justice White discounted as insubstantial the stifling effect that punitive damages have on the news media. He stressed the financial health of media conglomerates and their ability to disperse the burden of libel judgments over the broad base of their shareholders. Id. at 390-92. He disregarded, however, the stifling effect of libel judgments on small media defendants, many of whom publish politically unpopular viewpoints such as the defendant in Gertz. See pt. III infra.

50. 418 U.S. at 341. The legitimate state interest which Gertz recognized was the state's interest in seeing a plaintiff compensated for loss to his reputation. This is distinguishable from the interest in protecting the plaintiff from harm to his reputation, which Justice Harlan had argued constitutionally justified punitive damages as a deterrent. See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 73 (1971) (dissenting opinion); Curtis Publishing Co. v. Butts, 388 U.S. 130, 160-61 (1967).

51. See Time, Inc. v. Firestone, 424 U.S. 448, 465 (1976) (Powell, J., concurring); Gertz v. Robert Welch, Inc., 418 U.S. 323, 341, 348-50 (1974); Linn v. Plant Guard Workers Local 114, 383 U.S. 53, 63-64 (1966); cf. Jacron Sales Co. v. Sindorf, 276 Md. 580, 589, 350 A.2d 688, 693 (1976).

the state's interest in compensating injury. Therefore the Court held that at least in private figure cases where the *New York Times* standard has not been satisfied, punitive damages cannot be awarded consistently with the first amendment.[52] However, the Court took great pains to leave open the question of whether punitive damages would be allowed in cases where the plaintiff meets the *New York Times* test.[53]

The reasoning of *Gertz* casts serious doubts on the validity of that portion of the plurality opinion in *Butts* which upheld the constitutionality of punitive damages.[54] In *Butts*, Justice Harlan had found punitive damages were justified as a deterrent. In *Gertz*, however, the Court recognized that in deterring libelous statements punitive damages also stifle free expression of opinion. It found no compelling state interest which could justify this infringement on the first amendment.[55] In a dissenting opinion to *Rosenbloom*, Justice Harlan later repudiated his position in *Butts* and conceded "a more precise balancing of the conflicting interests involved is called for in this delicate area."[56] He concluded that the first amendment prohibited an award of punitive damages unless the *New York Times* requirements were satisfied and unless such damages "bear a reasonable and purposeful relationship to the actual harm done."[57] Justice Harlan refused, however, to abandon his view that punitive damage awards have some value as a deterrent. He declined to find them unconstitutional in all cases because they are needed in the narrow range of cases where compensatory damages are too small to deter future defamation.[58]

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52. 418 U.S. at 350.

53. See id. at 349-50; note 85 infra.

54. See Buckley v. Littell, 539 F.2d 882, 897 (2d Cir. 1976), cert. denied, 97 S. Ct. 785 (1977), Davis v. Schuchat, 510 F.2d 731, 737 & n.6 (D.C. Cir. 1975). However, there is no doubt that Butts is still good law on the proposition for which it is most often cited, namely, that the constitutional protection recognized against suits brought by public officials in New York Times extends as well to cases brought by public figures. E.g., Tripoli v. Boston Herald-Traveler Corp., 359 Mass. 150, 154, 268 N.E.2d 350, 353 (1971); Standke v. B.E. Darby & Sons, Inc., 291 Minn. 468, 474, 193 N.W.2d 139, 144 (1971), petition for cert. dismissed, 406 U.S. 902 (1972).

55. 418 U.S. at 348-50. By declaring punitive damages unconstitutional because of the self-censorship effect they produce on the media, the Court in Gertz also undercut Justice Harlan's argument that a publisher should not be exempted from punitive damages "because of the nature of his calling." 388 U.S. at 160.

56. Rosenbloom v. Metromedia, Inc., 403 U.S 29, 72 n.3 (1971) (dissenting opinion).

57. Id. at 77. Justice Harlan envisioned a jury instruction explaining the purposes of punitive damages coupled with judicial review to make certain the punitive award was actually rationally related to the compensatory award. Id. at 75-76 & n.4. His solution would provide no more protection than the common-law rule that punitive damages not be excessive. The majority in Gertz characterized this rule as "gentle" and insufficient to remove the stifling effect of punitive damages. 418 U.S. at 350. Justice Marshall doubted whether such a jury instruction would produce non-arbitrary punitive damage awards and suggested all that would be accomplished would be the addition of the "chant of some new incantation" to the jury instruction. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 85 (1971) (dissenting opinion).

58. Id. at 75-77.

Justice Harlan's faith that the reasonable relationship rule can remedy the arbitrary defects of punitive damages is not shared by all commentators.[59] Prosser suggested that at common law this rule was little more than a device invoked by the court when it disagreed with the jury's bias.[60] Other commentators state that the rule is difficult to administer and merely offers the defendant the hope of a "futile appeal."[61] The strongest objection, however, is that the rule defeats the deterrent function of punitive damages. If the jury is not free to adjust the amount of the punitive damage award to the character of the defendant's wrong, the award loses its value as a warning that particularly outrageous conduct will be severely punished.[62]

The objections to the deterrent effects of punitive damages raised in *Gertz* have been extended by a number of lower courts to hold *punitive* awards unconstitutional in public figure cases[63] and in private figure cases[64] even when the *New York Times* test has been met. The results in the private figure cases, however, are of little value as precedent since the state courts which decided them have never recognized the doctrine of punitive damages in any tort case.[65] These courts merely invoked the constitutional arguments to justify their previous damage policy. The public figure cases dealt more squarely with the issues.

In *Sprouse v. Clay Communication, Inc.*,[66] a state court reversed a $500,000 punitive damage award against a newspaper which had printed defamatory material concerning a candidate for governor. It held that such arbitrary awards lead to self-censorship and literally give the jury the power to destroy a newspaper, especially if the publication "lack[s] substantial financial assets."[67] However, *Sprouse* considered punitive damages too valu-

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59. See Comment, Defamation Law in the Wake of Gertz v. Robert Welch, Inc.: The Impact on State Law and the First Amendment, 69 Nw. U.L. Rev. 960, 982 n.108 (1975); Punitive Damages, supra note 11, at 614-15.

60. Prosser, supra note 15, § 2, at 14.

61. Comment, Nominal Damages as a Basis for Awarding Punitive Damages in California, 3 Stan. L. Rev. 341, 346-47 (1951).

62. See Exemplary Damages, supra note 27, at 531; Developments, supra note 21, at 120; Comment, Nominal Damages as a Basis for Awarding Punitive Damages in California, 3 Stan. L. Rev. 341, 345 (1951).

63. Maheu v. Hughes Tool Co., 384 F. Supp. 166, 173-74 (C.D. Cal. 1974); Sprouse v. Clay Communication, Inc., 211 S.E.2d 674, 692 (W. Va.), cert. denied, 423 U.S. 882 (1975).

64. Taskett v. King Broadcasting Co., 86 Wash. 2d 439, —, 546 P.2d 81, 86 (1976) (en banc); Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161, 169 (Mass. 1975). For the most part, these courts have followed the reasoning set out in the Supreme Court cases by objecting to the arbitrary nature of punitive damages. "[T]he element most likely to give rise to self-censorship is the uncontrolled discretion of juries to award damages . . . ." 86 Wash. 2d at —, 546 P.2d at 86. "[T]he possibility of excessive and unbridled jury verdicts . . . may impermissibly chill the exercise of First Amendment rights . . . ." 330 N.E.2d at 169.

65. See Ellis v. Brockton Publishing Co., 198 Mass. 538, 543, 84 N.E. 1018, 1020 (1908); Farrar v. Tribune Publishing Co., 57 Wash. 2d 549, 552-53, 358 P.2d 792, 794-95 (1961) (en banc); Ott v. Press Publishing Co., 40 Wash. 308, 312, 82 P. 403, 404 (1905).

66. 211 S.E.2d 674 (W. Va.), cert. denied, 423 U.S. 882 (1975).

67. Id. at 690; see id. at 692. The recognition that punitive damages could put a publication

able as a deterrent to abolish them completely. In dictum the court noted that punitive damages may be awarded consistently with the first amendment if the compensatory damages are not large enough to act as a deterrent.[68] In *Sprouse* compensatory damages of $250,000 were found sufficient to deter publishers from engaging in similar abuses.[69]

In *Maheu v. Hughes Tool Co.*,[70] the court held that the state's interest in employing punitive damages as a deterrent was not substantial enough to justify the infringement of such damages on first amendment rights.[71] The court found that the expense of defending against a libel suit and compensatory damages were sufficient deterrents to defamation.[72] In addition it held that the state has less interest in deterring attacks on the reputation of public figures. Public figures have thrust themselves "to the forefront of particular public controversies"[73] and have enough influence that their statements in defense of their reputation will usually be published by the news media.[74] Even if deterrence could be considered a legitimate interest, *Maheu* concluded that there were methods less restrictive of first amendment rights by which punitive damages might be awarded as a deterrent.[75]

The court found one limited area in which deterrence is a legitimate state interest which would justify the award of punitive damages for libel. That is when the defamation is so aggravated that it could fairly be said to be an invasion of the plaintiff's constitutional right to privacy.[76] The court found this state interest was not as compelling in libel actions brought by public figures, who have voluntarily exposed themselves to attack by entering the

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out of business is especially important in the case of small media defendants. See notes 242-43 infra and accompanying text.

68. 211 S.E.2d at 692-93. See 78 W. Va. L. Rev. 247, 256-57 (1976) for criticism of this dictum, largely on the basis that it is not consistent with the trend of Supreme Court thought. An analogous result was reached in Hotchner v. Castillo-Puche, Civil No. 74-5516 (S.D.N.Y., July 30, 1976), rev'd, Civil No. 76-7479 (2d Cir., March 23, 1977), where the court looked to the adequacy of the compensatory damages in upholding an award of punitive damages. Id. at 5-6.

69. 211 S.E.2d at 692. The court admitted there had been no evidence which would allow the jury to calculate plaintiff's damages in a "mathematical way." Id. However, it held that compensatory damages were justified by the mental anguish and humiliation the plaintiff must have felt. Id. at 693. Little is gained by declaring punitive damages unconstitutional if damages for emotional distress will be upheld without actual evidence to support them. One commentator called such a result giving protection with one hand and taking it away with another. 10 Suffolk U.L. Rev. 126, 140 (1975). See notes 276-88 infra and accompanying text.

70. 384 F. Supp. 166 (C.D. Cal. 1974).

71. 384 F. Supp. at 170-71.

72. Id. at 170. The court noted this was especially so in view of the "broad range" of damages which Gertz allowed under the heading of actual injury. Id. at 170-71. See notes 286-88 infra and accompanying text.

73. Id. at 171, quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

74. Id.

75. 384 F. Supp. at 173. The less restrictive alternatives suggested were placing a "dollar limit" on the amount of punitive damages which could be awarded, restricting them to a multiple of actual damages, or awarding costs and attorney's fees in their stead. Id.

76. Id. at 171-72.

realm of public life.[77] Thus, the exception was confined to private figure cases where the interest in privacy is stronger.

Maheu also addressed the question left open in *Gertz*[78] of whether the first amendment prohibits the award of punitive damages in cases where the *New York Times* test is met. It held that awareness by publishers that a jury may return an arbitrary punitive damage award still induces self-censorship even though the media may be greatly sheltered from liability under the *New York Times* standard.[79] The standard provides protection only at the threshold of liability, and a jury bent on punishing unpopular opinion could do so even when the evidence did not fully satisfy the standard.[80] Even though a plaintiff or his attorney knows he must meet the *New York Times* test, the "jackpot of open-ended recovery" through punitive damages still "invite[s] lawsuits."[81] For these reasons, *Maheu* found the actual malice standard "does not cure the self-censorship effect of punitive damages."[82]

At least three federal courts have reached the opposite result and have upheld awards of punitive damages for libel to public figures when the *New York Times* test had been satisfied.[83] The argument most consistently made in these cases is that punitive damages are needed as a deterrent against future defamation.[84] Some of the reasoning has been scanty.[85] Cases which simply

77. 384 F. Supp. at 171.

78. 418 U.S. at 348-50; see note 85 infra.

79. 384 F. Supp. at 170.

80. Id. One commentator found the argument that juries will punish unpopular opinions "may be more theoretical than real." 2 West. St. L. Rev. 305, 315 (1975). However, one need not look far to find cases where juries have returned huge verdicts against publishers of unpopular views. E.g., Gertz v. Robert Welch, Inc., 418 U.S 323, 329 (1974) ($50,000 against the publisher of a right wing magazine); New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964) ($500,000 by a Southern jury against a newspaper soliciting contributions for a black civil rights leader during a time of racial unrest).

81. 384 F. Supp. at 170.

82. Id.

83. Appleyard v. Transamerican Press, Inc., 539 F.2d 1026, 1030 (4th Cir. 1976), cert. denied, 97 S. Ct. 740 (1977); Davis v. Schuchat, 510 F.2d 731, 737-38 (D.C. Cir. 1975); Goldwater v. Ginzburg, 414 F.2d 324, 340-41 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970). More often courts uphold a punitive damage award without any discussion of the substantive law of punitive damages. E.g., Buckley v. Littell, 539 F.2d 882, 897 (2d Cir. 1976), cert. denied, 97 S. Ct. 785 (1977).

84. Occasionally a court will also justify punitive damages on the ground they compensate plaintiff for attorney's fees. Hotchner v. Castillo-Puche, Civil No. 74-5516, at 6 (S.D.N.Y., July 30, 1976), rev'd, Civil No. 76-7479 (2d Cir., March 23, 1977). Some courts argue punitive damages are not arbitrary because the jury's discretion can be controlled by the trial judge through remittitur. Davis v. Schuchat, 510 F.2d 731, 737-38 n.7 (D.C. Cir. 1975). The reliance on remittitur, however, is grounded in the faith that few judges will share a jury's predisposition to punish unpopular opinion. There has been some reluctance to place such faith in the discretion of judges when sensitive first amendment values are at stake. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 79 (1971) (Marshall, J., dissenting); Maheu v. Hughes Tool Co., 384 F. Supp. 166, 173 (C.D. Cal. 1974). Remittitur has been criticized as an ineffective check on a jury's discretion. See C. McCormick, Handbook on the Law of Damages § 77, at 276 (1935) [hereinafter cited as McCormick].

85. Two of these cases have simply concluded that speech is not protected by the first

state that punitive damages are a necessary deterrent[86] have ignored the conflict between deterrence and the first amendment and the balancing approach which the Supreme Court has adopted to resolve the conflict. Only one of these cases, *Appleyard v. Transamerican Press, Inc.*,[87] considered this problem. It concluded that when punitive damages are excessive they could indeed infringe on the first amendment.[88] But the *Appleyard* court did not consider the $5,000 punitive damage award before it as excessive, so it did not reach the question of what type of protection is needed against a large arbitrary punitive damage award.[89]

2. Retribution

Courts seldom expressly justify an award of punitive damages on the grounds of retribution,[90] but commentators believe the desire to punish a

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amendment when New York Times actual malice is demonstrated. Appleyard v. Transamerican Press, Inc., 539 F.2d 1026, 1030 (4th Cir. 1976), cert. denied, 97 S. Ct. 740 (1977); Davis v. Schuchat, 510 F.2d 731, 737-38 (D.C. Cir. 1975). Both of the cases rely heavily on the opinion in Gertz. However, Gertz took particular pains to leave open the question of whether punitive damages may be awarded in cases where the plaintiff successfully proves New York Times actual malice on the part of the publisher. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-49, 350 (1974). In at least one other context the Court has declined to reach the question of whether or not speech may be punished even though it was uttered with actual malice. Pickering v. Board of Educ., 391 U.S. 563, 574 n.6 (1968) (punishing teacher with dismissal for exercising right to free speech). See also Garrison v. Louisiana, 379 U.S. 64, 78 (1964) (criminal libel). Since the Court has declined to reach the question in a number of contexts, it is probable that the cases which read Gertz as implying that speech is not protected if actual malice is proven are wrong. In addition to relying on Gertz, the Appleyard decision attempts to reach the conclusion by independent reasoning. It stated that the New York Times actual malice rule was not designed to protect false statements of fact, but only to insure that the media would not feel restrained in their criticism of official conduct. Thus it would follow that defamation published with actual malice does not fall within the protection of New York Times because "there is no good-faith attempt to point out real abuses to the public." 539 F.2d at 1030. The conclusion apparently ignores, however, the Supreme Court's expansion of first amendment protection beyond the realm of criticism of official conduct into broader areas of public concern. E.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-50 (1974) (establishing constitutional damages rules in private figure cases); Curtis Publishing Co. v. Butts, 388 U.S. 130, 162 (1967) (Warren, C.J., concurring) (constitutional privilege for public figures as well as public officials). The Supreme Court has repeatedly said that false statements of fact may indeed be protected by the Constitution, because extending protection to some falsehood may be the only way to insure protection of "speech that matters." Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974); accord, Time, Inc. v. Firestone, 424 U.S. 448, 472 (1976) (Brennan, J., dissenting); St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

86. E.g., Goldwater v. Ginzburg, 414 F.2d 324, 341 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970).

87. 539 F.2d 1026 (4th Cir. 1976).

88. 539 F.2d at 1030.

89. Id.

90. But see Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 73 (1971) (Harlan, J., dissenting) ("the State always retains an interest in punishing more severely conduct that, although it causes the same effect, is more morally blameworthy."); Washington Gas Light Co. v. Lansden, 172

wrongdoing defendant is often the motive for awarding punitive damages.[91] Compensatory damages have little retributive function because they are expressly calculated to make the plaintiff whole. But there is necessarily an element of retribution in the award of punitive damages because they are taken from the defendant and given to the plaintiff for no such discernable reason.[92] Historically, it was assumed that a plaintiff who was vindicated by an award of punitive damages would have no need to resort to self-help and a breach of the peace would thereby be avoided.[93] That rationale hardly seems justifiable in modern society,[94] especially in the case of a tort such as libel which does not involve physical confrontation.

It has been suggested that one reason the courts have avoided justifying punitive damages in libel solely on the grounds that false speech must be punished for punishment's sake is that they anticipate arguments that such punishment cannot be imposed without the criminal safeguards guaranteed by the Constitution.[95] These arguments have inspired more interest among commentators than the courts.[96] The objection that punitive damages violate the prohibition against double jeopardy has been litigated, although it is usually dismissed summarily on the grounds that double jeopardy as used in the Constitution applies only to criminal proceedings.[97] Indiana is the only

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U.S. 534, 553 (1899) (libel decision citing punishment as justification for punitive damages); Goldwater v. Ginzburg, 414 F.2d 324, 341 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970) ("No doubt the jury believed . . . the malice-inspired smears on Senator Goldwater's reputation should be removed and its perpetrators punished."). The courts are more apt to express a punishment rationale in non-libel contexts; e.g., Tolle v. Interstate Systems Truck Lines, Inc., 1 Ill. Dec. 437, ——, 356 N.E.2d 625, 626 (1976) (personal injury); Newton v. Standard Fire Ins. Co., 291 N.C. 105, 229 S.E.2d 297, 302 (1976) (contract).

91. See Exemplary Damages, supra note 27, at 521-22; Comment, The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.U.L. Rev. 1158, 1161-62 (1966) [hereinafter cited as Punishment]; Comment, Punitive Damages and Their Possible Application in Automobile Accident Litigation, 46 Va. L. Rev. 1036, 1039-41 (1960).

92. Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1177 n.7 (1931) [hereinafter cited as Morris]; see Exemplary Damages, supra note 27, at 523. Punitive damages are more personal than a criminal fine, which is paid into the public treasury. Punishment, supra note 91, at 1162.

93. See id.; Exemplary Damages, supra note 27, at 522.

94. See Federal Statutes, supra note 26, at 210.

95. Morris, supra note 92, at 1197.

96. See McCormick, supra note 84, § 77, at 275-76; Morris, supra note 92, at 1197; Exemplary Damages, supra note 27, at 524-25; Punitive Damages, supra note 11, at 612-13. Perhaps the most satisfactory conclusion in the commentary is that criminal safeguards should be confined to the criminal law, where the stigma and sanctions of conviction are most severe. See Punishment, supra note 91, at 1181. The author concludes, however, that punitive damages violate the prohibition against double jeopardy when they are levied following a conviction for the same conduct. Id. at 1183, 1185.

97. See Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 663 n.48 (D.C. Cir. 1966); Svejcara v. Whitman, 82 N.M. 739, 741, 487 P.2d 167, 169 (1971). McCormick dismissed the objections saying it is the "tendency of the times" to reduce criminal safeguards anyway. McCormick, supra note 84, § 77, at 277-78.

state to hold that punitive damages cannot be assessed constitutionally for an act which is also subject to criminal penalties.[98] The Supreme Court has shown no inclination to follow Indiana's lead,[99] however it has invoked this line of reasoning at least once in the first amendment area. One of the grounds the Court cited in overturning the libel judgment in *New York Times* was that it was imposed without the safeguards which would have been available to the defendant if he had been prosecuted for criminal libel.[100]

Even when it has upheld a criminal libel statute, the Supreme Court has avoided the rationale of retribution or statements to the effect that libelous speech may be punished.[101] While there is a clear aversion to the idea of punishing speech in a number of cases, libel is one of the three categories of speech which do not enjoy full first amendment protection.[102] The others are obscenity and what might be called *incendiary* speech, that which threatens violence or an immediate breach of the peace.[103] While there are clear precedents upholding the imposition of punishment for obscenity[104] and incendiary speech,[105] in the case of defamation the precedents are not as clear.

The case most often cited for the proposition that defamatory speech may be punished is *Beauharnais v. Illinois*,[106] in which the Supreme Court upheld a criminal libel statute. The statute in question prohibited the public dissemination of statements so derogating a racial group that a "breach of the peace

98. Taber v. Hutson, 5 Ind. 322, 325 (1854); see Aldrige, The Indiana Doctrine of Exemplary Damages and Double Jeopardy, 20 Ind. L.J. 123 (1945). The same reasoning has been cited in states which have refused to recognize the doctrine of punitive damages. See Fay v. Parker, 53 N.H. 342, 386-93 (1873).

99. See Rex Trailer Co. v. United States, 350 U.S. 148, 152-54 (1956); Helvering v. Mitchell, 303 U.S. 391, 399 (1938).

100. 376 U.S. at 277-78. Accord, Garrison v. Louisiana, 379 U.S. 64, 67 (1964) ("we see no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws . . . .").

101. There is one notable exception, Near v. Minnesota, 283 U.S. 697 (1931), which contains dictum that "punishment for the abuse of the liberty accorded to the press is essential to the protection of the public . . . ." Id. at 715. This dictum represents the interpretation usually given to the first amendment before the New York Times doctrine was developed. See 2 J. Story, Commentaries on the Constitution of the United States § 1884. Curtis Publishing Co. v. Butts, 388 U.S. 130, 159-61 (1967) upheld an award of punitive damages for libel without discussing the rationale of retribution. See notes 34-39 and 54-62 supra and accompanying text.

102. The classic list of the types of speech outside the first amendment is contained in Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942): "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

103. The term incendiary is used to suggest that the "fighting words" cases following Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) may be logically grouped with the "clear and present danger" cases following Schenck v. United States, 249 U.S. 47 (1919).

104. E.g., Roth v. United States, 354 U.S. 476, 481-85 (1957).

105. E.g., Dennis v. United States, 341 U.S. 494 (1951).

106. 343 U.S. 250 (1952); see, e.g., Porter v. Kimzey, 309 F. Supp. 993, 996 n.3 (N.D. Ga. 1970), aff'd, 401 U.S. 985 (1971).

or riots"[107] might immediately result. Given the past history of violent racial incidents in Illinois, the Court found that the state legislature could have reasonably concluded that racist material circulated in public might so inflame a crowd as to spark a riot.[108] Therefore, it would seem that *Beauharnais* speaks more to the third category of speech—that which tends to incite an immediate breach of the peace. It is at least arguable that *Beauharnais* really stands for the principle that incendiary speech may be punished.[109]

Beauharnais is the only constitutional case in which the Supreme Court has upheld a conviction for criminal libel.[110] It has in two other instances struck down state criminal libel laws as unconstitutional.[111] In one of these cases, *Garrison v. Louisiana*,[112] the Court suggested it would have upheld the statute if it had been so narrowly drafted as to apply only to speech which created an immediate breach of the peace. The Court quoted with approval a passage from the Model Penal Code stating speech is an inappropriate subject "for penal control" unless it incites violence.[113] Thus, as it did in *Beauhar-*

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107. 343 U.S. at 251.

108. Id. at 258-61. The reason the Court declined to hold criminal libel statutes unconstitutional may have been the wide acceptance of such statutes in the United States and the strong common-law tradition of criminal libel. See Note, Constitutionality of the Law of Criminal Libel, 52 Colum. L. Rev. 521, 533-34 (1952). Even though statutes are common, however, it appears prosecutions for criminal libel are seldom brought. Although no statistics appear to have been compiled in the United States, this assertion is borne out by a study reported in Britain, where criminal libel prosecutions would, if anything, be expected to be more numerous because they do not conflict with constitutional free press guarantees. The study indicated that the annual average number of libel prosecutions in England and Wales "from 1950 to 1954 was four, for 1955 to 1959 two, and for 1960 to 1964 two." The numbers decreased to zero in 1967 and one each in 1969, 1971 and 1973. See Report of the Committee on Defamation, Cmnd. No. 5909, at 121 (1975).

109. This reading of Beauharnais is supported by the fact that the Court almost conscientiously avoided making any statement that libelous speech may be punished. It always stated the problem in conditional terms such as: "But if an utterance directed at an individual may be the object of criminal sanctions . . . ." 343 U.S. at 258. Kelly, Criminal Libel and Free Speech, 6 U. Kan. L. Rev. 295, 321 (1958).

110. The Court also upheld a conviction for criminal libel under a Philippine statute in Ocampo v. United States, 234 U.S. 91 (1914). However, the case is of no constitutional significance since the Constitution does not apply of its own force in the Philippines. Id. at 98; see Dorr v. United States, 195 U.S. 138, 149 (1904).

111. Ashton v. Kentucky, 384 U.S. 195 (1966); Garrison v. Louisiana, 379 U.S. 64 (1964). In Ashton the Court held a state common-law crime of criminal libel was unconstitutionally vague. 384 U.S. at 198-201. In Garrison the Court applied the New York Times actual malice rule. The Louisiana statute incorporated the common-law rule of criminal libel that prohibited injurious words spoken with bad motive, even if they were true. The Court found that this provision violated the New York Times rule, which absolutely protects true speech. 379 U.S. at 78. There is an argument that Beauharnais has been overruled by these two later cases. See Tollett v. United States, 485 F.2d 1087, 1094 (8th Cir. 1973) ("In fact, with the advent of Garrison and Ashton, a strong argument may be made that there remains little constitutional vitality to criminal libel laws."); T. Emerson, The System of Freedom of Expression 396 (1970); but see Eberle v. Municipal Court, 55 Cal. App. 3d 423, 433, 127 Cal. Rptr. 594, 600 (2d Dist. 1976).

112. 379 U.S. 64 (1964).

113. Id. at 70, quoting Model Penal Code, Tent. Draft No. 13, 1961, § 250.7, Comments, at 44.

nais, the Court implied in *Garrison* that the only time when the punishment of libelous speech is justified is when the speech is also incendiary.

Punitive damages might be more plausibly justified under the rubric of retribution in cases where it can be shown that they invade a fundamental right.[114] In such a case punitive damages would stigmatize the party who invaded the right, thereby vindicating its importance in the eyes of society.[115] A person's interest in his or her good name is clearly an important right,[116] which one authority at least has suggested deserves constitutional protection.[117] Thus, the retributive function of punitive damages might justify the award of such damages because they vindicate the importance of the right to an unblemished reputation. This may explain the feeling apparent in some of the libel cases that something more than actual damages should be awarded in view of the invidiousness of the wrong committed by publication of defamatory falsehood.[118]

Rather than adopt the rationale of retribution, however, the courts have demonstrated an aversion to the idea of punishing speech. This aversion is apparent even in cases where speech is libelous, and it is often the strongest in cases where the speaker is not powerful enough to protect his own rights. For example, a lifeguard could not be fired for criticizing officials of the municipality which employed him, even if his criticism was libelous.[119] Prison officials cannot suppress the publication of a small newspaper printed by the prisoners even though the newspaper contains libelous statements.[120] And in

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114. It is common for courts to award damages for deprivation of constitutional rights even though no proof of injury is offered. See Nixon v. Herndon, 273 U.S. 536, 540 (1927) (right to vote). The cases sometimes purport to award damages under a category such as emotional distress even though no proof of emotional harm has been made. See Seaton v. Sky Realty Co., Inc., 491 F.2d 634, 636-38 (7th Cir. 1974). Or they may expressly state that the damages are "nonpunitive." Hostrop v. Board of Jr. College Dist. No. 515, 523 F.2d 569, 579 (7th Cir. 1975), cert. denied, 425 U.S. 963 (1976). But it is often clear from the language of the decisions that the courts intend these damages to vindicate the invasion of the constitutional right. See id. ("Plaintiff is entitled to damages for that constitutional violation."); Wayne v. Venable, 260 F. 64, 66 (8th Cir. 1919) ("In the eyes of the law this right [to vote] is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing . . . .").

115. See Federal Statutes, supra note 26, at 211.

116. See Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (The interest in reputation "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); The Supreme Court, 1975 Term, 90 Harv. L. Rev. 1, 93 & n.50 (1976).

117. See Paul v. Davis, 424 U.S. 693, 727, 731-32, 734 (1976) (Brennan, J., dissenting); cf. Time, Inc. v. Firestone, 424 U.S. 448, 471-72 (1976) (Brennan, J., dissenting).

118. See Appleyard v. Transamerican Press, Inc., 539 F.2d 1026, 1030 (4th Cir. 1976), cert. denied, 97 S. Ct. 740 (1977); Hotchner v. Castillo-Puche, Civil No. 74-5516, at 5-6 (S.D.N.Y., July 30, 1976), rev'd, Civil No. 76-7479 (2d Cir., March 23, 1977); Sprouse v. Clay Communication, Inc., 211 S.E.2d 674, 692-93 (W. Va.), cert. denied, 423 U.S. 882 (1975).

119. Donovan v. Reinbold, 433 F.2d 738, 742 (9th Cir. 1970).

120. The Luparar v. Stoneman, 382 F. Supp. 495, 500 (D. Vt. 1974); see Carothers v. Follette, 314 F. Supp. 1014, 1022 (S.D.N.Y. 1970).

the leading case interpreting the Landrum-Griffin Act's provision on speech in union meetings, the court held the Act prohibits a union from disciplining a member for voicing his opinions, even if his statements were libelous.[121] The court in that decision laid special emphasis on the imbalance of power between union officials and union members.[122]

This antipathy toward punishing speech makes it unlikely that the Court would ever recognize a legitimate state interest in punitive damages in libel actions based on their retributive function.[123] Moreover, the fact that a number of these cases dealt with speakers not powerful enough to protect their own rights suggests that punitive damages as retribution are even more suspect in the case of small media defendants.[124]

3. Compensation

Punitive damages developed historically as a compensatory device, allowing recovery for injuries which the courts did not recognize as compensa-

121. Salzhandler v. Caputo, 316 F.2d 445, 446 (2d Cir. 1963); see Morrissey v. National Maritime Union, 397 F. Supp. 659, 666 (S.D.N.Y. 1975), aff'd in part, rev'd in part, 544 F.2d 19 (2d Cir. 1976).

122. 316 F.2d at 451. The consensus of the cases is that although the union official may not punish the union member, he may sue for libel in the civil courts. Id.; see Stark v. Carpenters Dist. Council, 219 F. Supp. 528, 537 (D. Minn. 1963). However, a contrary conclusion might be suggested by a recent California case holding that statements which would otherwise be libelous might not be actionable if they were uttered in the context of a labor dispute. See Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 601, 131 Cal. Rptr. 641, 644, 552 P.2d 425, 428 (1976).

123. The antipathy to the idea of punishing speech can be found in a wide range of cases. The Supreme Court has held that a teacher's false statements critical of the school board could not be used as grounds for punishing him with dismissal, because it would stifle free discussion. Pickering v. Board of Educ., 391 U.S. 563, 574 (1968). The Court expressly left open the question of whether the teacher could have been punished if his statement had been uttered with New York Times actual malice. Id. at 574 n.6. See also Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256-57 (1974); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam); Wood v. Georgia, 370 U.S. 375, 389 (1962).

Lower courts have held that students may not be punished for publishing their own newspaper, even when it criticizes school discipline, Scoville v. Board of Educ., 425 F.2d 10, 14 (7th Cir.), cert. denied, 400 U.S. 826 (1970), or when it might tend to cause a "disturbance." Shanley v. Independent School Dist., 462 F.2d 960, 974 (5th Cir. 1972); contra, Eisner v. Board of Educ., 440 F.2d 803, 808 (2d Cir. 1971).

Newspaper licensing taxes have been struck down on the ground that they tend to limit circulation of knowledge and are suspiciously similar to a penalty. See Grosjean v. American Press Co., 297 U.S. 233, 251 (1936) ("The form in which the tax is imposed is in itself suspicious. . . . It is measured alone by the extent of the circulation . . . with the plain purpose of penalizing the publishers . . . ."). The Court suggested that only a non-discriminatory tax applied to the population generally could be levied on newspapers. Id. at 250. But there are cases in which the courts have refused to apply even a non-discriminatory tax to certain small publications on the grounds it would unduly stifle the expression of diverse viewpoints if applied to such small entities. Long v. Anaheim, 255 Cal. App. 2d 191, 198-99, 63 Cal. Rptr. 56, 61 (4th Dist. 1967); see Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); Gall v. Lawler, 322 F. Supp. 1223, 1225 (E.D. Wis. 1971).

124. See pt. III infra.

ble.[125] There is still no doubt some consensus that punitive damages are justified to correct one of the "glaring defects" in our judicial system—denial of recovery for legal fees.[126] While the feeling that punitive damages help compensate a plaintiff may underlie the reasoning in some cases,[127] it is insufficient justification in itself for the award of such damages, especially in the sensitive first amendment area of libel law.[128] Even if the need for compensation for legal fees is compelling,[129] a less restrictive means to accomplish this should be sought to minimize the chilling effects of arbitrary punitive damage awards. Legislation to permit recovery of attorney's fees has been suggested as one such alternative,[130] or a court could adopt a judicial rule such as the one in Connecticut which restricts punitive damages to proven legal fees.[131]

II. PRIVATE FIGURES VS. PUBLIC FIGURES AND PUBLIC OFFICIALS

The Supreme Court distinguishes between two groups of plaintiffs for the purposes of assessing liability in libel actions. The first category includes both public officials—individuals employed in a government capacity[132]—and public figures—those who occupy a position of special prominence in society or have thrust themselves into the center of a public controversy.[133] The second group of plaintiffs, private figures, includes everyone else.[134] The state

125. Exemplary Damages, supra note 27, at 519-20; Punishment, supra note 91, at 1163. At least one state still allows punitive damages to compensate plaintiff for mental suffering. See Wise v. Daniel, 221 Mich. 229, 190 N.W. 746 (1922).

126. McCormick, supra note 84, § 77, at 277. One state, in fact, expressly limits recovery of punitive damages in libel actions to litigation expenses less costs. Craney v. Donovan, 92 Conn. 236, 238, 102 A. 640, 641 (1917).

127. See Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 662 (D.C. Cir. 1966) (en banc); Hotchner v. Castillo-Puche, Civil No. 74-5516, at 6 (S.D.N.Y., July 30, 1976), rev'd, Civil No. 76-7479 (2d Cir., March 23, 1977). Even one commentator who argued for the abolition of punitive damages in libel cases recognized their compensatory function and suggested that they be replaced by a statutory scheme for recovery of litigation expenses. See Punitive Damages, supra note 11, at 615.

128. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 73 (1971) (Harlan, J., dissenting); see Exemplary Damages, supra note 27, at 522; cf. Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-50 (1974).

129. The Supreme Court has found a legitimate state interest in compensating the plaintiff for injury to reputation, but it is noteworthy that the Court made no mention of attorney's fees in its discussion of compensation. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 341, 350 (1974). The Court made it clear that giving the jury discretion to award damages is inconsistent with the guarantees of the first amendment, and therefore it imposed the requirement of proof of actual injury as a condition to any recovery. 418 U.S at 348-50. Of course, punitive damages fail to meet the requirements of being supported by proof of injury.

130. See Punitive Damages, supra note 11, at 615.

131. See Craney v. Donovan, 92 Conn. 236, 238, 102 A. 640, 641 (1917).

132. St. Amant v. Thompson, 390 U.S. 727 (1968) (deputy sheriff); Rosenblatt v. Baer, 383 U.S. 75 (1966) (employee in charge of county recreation area); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (city commissioner).

133. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

134. Id. at 342-43.

interest in awarding punitive damages as a deterrent, which is the only function of punitive damages which retains any justification at all under the first amendment,[135] will now be examined with respect to each of these two groups of libel plaintiffs.

The state has more of an interest in deterring defamation in the case of private figures, who have surrendered none of their right of personal privacy by entering public life and who are seldom involved in public debate.[136] The Supreme Court has set the *New York Times* test as the minimum requirement for the recovery of punitive damages in such cases.[137] This standard sufficiently balances the state's interest in deterring defamation of private figures with the policy of protecting the media from the chilling effects of punitive damages.

These chilling effects are a less tolerable infringement on the first amendment, however, in cases involving public figures and public officials, who are more likely to be involved in issues of serious public debate.[138] In these areas the media should be given the widest latitude in which to operate. It is therefore submitted the *New York Times* test is not sufficient to shield publishers and broadcasters from the stifling effects of punitive damages.[139] It will be suggested an additional requirement of intent to injure is needed.[140]

A. *State Interest in Awarding Punitive Damages to Private Figures*

The interest in free public debate, which allows the media to make even "vehement" and "caustic" attacks on public officials,[141] does not extend to facts involved in the life of a private figure.[142] Public figures and public officials command great news interest, and their statements in defense of their reputation will most likely be given high exposure by the media.[143] By thrusting themselves into events of public concern, such plaintiffs have held up their reputation to "the risk of closer public scrutiny"[144] and thereby risked being defamed.[145] The need for a deterrent to defamation is greater in cases involving a private figure, whose statements in defense of his reputation are likely to be ignored by the media and who has "relinquished no part of his interest in the protection of his own good name . . . ."[146]

Although all libel plaintiffs have an interest in receiving compensation for

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135. See pt. I(B) supra.
136. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974); pt. II(A) infra.
137. 418 U.S. at 350.
138. See id. at 342-43.
139. Maheu v. Hughes Tool Co., 384 F. Supp. 166, 170 (C.D. Cal. 1974); see pt. II(A) infra.
140. See pt. II(C) infra.
141. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
142. Time, Inc. v. Firestone, 424 U.S. 448, 454-55 (1976).
143. Gertz v. Robert Welch, Inc., 418 U.S 323, 344 (1974).
144. Id.
145. Id. at 345; Maheu v. Hughes Tool Co., 384 F. Supp. 166, 171 (C.D. Cal. 1974).
146. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

injury to their reputation,[147] private figure plaintiffs have a greater interest in preventing attention from being focused on their lives in the first place.[148] This interest is protected by the tort of unauthorized intrusion or prying into an individual's affairs,[149] sometimes characterized as the right to be left alone[150] or the right of privacy.[151] Courts sometimes state that an individual has a fundamental right to remain free from unauthorized prying into the facts of his life,[152] and that this right must be balanced against the news media's first amendment rights.[153] Thus if punitive damages serve the function of deterring such unauthorized prying, they might be awarded despite their chilling effects on the media.[154] Since private figure plaintiffs have a

147. The Supreme Court has recognized a legitimate state interest in compensating the libel plaintiff for injury to reputation. Id. at 348. In Time, Inc. v. Firestone, 424 U.S. 448 (1976), however, the Court indicated there might be other interests protected by libel law which justify infringement on the first amendment. There the Court affirmed an award of damages for emotional distress following a defamatory publication. The plaintiff had originally filed a claim for injury to reputation, but later dropped it. On its facts, the case arguably could have supported an action for intrusion or prying into private details of the plaintiff's life, since the media defendant had publicized sensational details about the plaintiff's sex life and divorce.

148. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). Perhaps the most basic attribute of the "right of privacy" recognized by lawyers and social scientists is the individual's right "to control the circulation of information relating to him." A. Miller, Assault on Privacy 25 (1971). This right is sometimes characterized as fundamental under the Constitution. See City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970) (en banc). But see Evans v. Carey, 53 App. Div. 2d 109, 116, 385 N.Y.S.2d 965, 970 (4th Dep't 1976).

149. Prosser, supra note 15, § 117, at 804; see Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 488 (1975).

150. See Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), overruled on other grounds, Katz v. United States, 389 U.S. 347, 353 (1967); Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 195 (1890), quoting Cooley on Torts 29 (2d ed. 1888).

151. Prosser, supra note 15, § 117, at 804.

152. E.g., Morris v. Danna, 411 F. Supp. 1300, 1303 (D. Minn. 1976) ("It is true that under some circumstances there can be such a gross abuse of privacy as to amount to an abridgment of fundamental constitutional guarantees."); People ex rel. Ford v. Doorley, 338 F. Supp. 574, 576-77 (D.R.I.), rev'd on other grounds, 468 F.2d 1143 (1st Cir. 1972); Dietemann v. Time, Inc., 284 F. Supp. 925, 929 (C.D. Cal. 1968), aff'd on other grounds, 449 F.2d 245 (9th Cir. 1971). But see Ellingburg v. Lucas, 518 F.2d 1196, 1197 (8th Cir. 1975) (per curiam) (conclusory).

153. See Dietemann v. Time, Inc., 284 F. Supp. 925, 929 (C.D. Cal. 1968), aff'd on other grounds, 449 F.2d 245 (9th Cir. 1971), where the court held a plaintiff's right to keep information about himself private was more compelling than the first amendment rights of a news magazine, whose reporters use a hidden microphone and camera to gather information for an article. See also Briscoe v. Reader's Digest Ass'n, Inc., 4 Cal. 3d 529, 540-41, 483 P.2d 34, 42, 93 Cal. Rptr. 866, 874 (1971); Beytagh, Privacy and a Free Press: A Contemporary Conflict in Values, 20 N.Y.L. Forum 453 (1975). The Supreme Court has left the states the task of protecting privacy in the sense of the right to be left alone. Katz v. United States, 389 U.S. 347, 350-51 (1967). Punitive damages is one remedy which a state may use to deter invasions of this right.

154. It is perhaps significant that the recognition of the legitimate state interest in seeing private figure plaintiffs compensated for injury to reputation, Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974), comes at a time when the Supreme Court has recognized a constitutional right of privacy in other cases. See Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). It is quite possible that it was the

greater interest in keeping the details of their lives undisclosed,[155] punitive damages are more appropriate in such cases. Public figures or public officials subject even their "personal attributes" and character to the media's inspection by entering public life,[156] and they have less of an interest in deterring prying into their affairs.

The conclusion is that punitive damages are constitutionally justified in private figure libel cases where the *New York Times* requirements are satisfied, because they deter prying into the plaintiff's affairs and are less likely to stifle free debate. In public figure and public official cases the objections to punitive damages assume their full force, however, and there is less of an interest in privacy to justify them. The only area in which public officials and public figures retain sufficient interest in privacy to justify an award of punitive damages is in the rare case where a publisher intentionally sets out to destroy the plaintiff's reputation with falsehoods. Outside this narrow area, which will be discussed below,[157] the best rule would be to prohibit the award of punitive damages in public figure and public official cases.

B. *Inadequacy of the Reckless Disregard Test to Protect the Media from Punitive Damages in Public Figure and Public Official Cases*

The fact that large,[158] arbitrary[159] punitive damage verdicts are still frequently affirmed in libel cases raises the question of whether the second

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expansion of the right of privacy which led the Court to reject the approach of Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971), and find a stronger interest in preventing the media from damaging the reputation of private figure plaintiffs in Gertz. See note 8 supra. Some of the recent decisions have come close to stating that a private figure's interest in his reputation enjoys some constitutional protection. See Time, Inc. v. Firestone, 424 U.S. 448, 455-56 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 487 (1975); Gertz v. Robert Welch, Inc., supra at 341 (1974), quoting Justice Stewart's assertion in a concurring opinion in Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) that the "private personality" is protected by the Constitution.

But see Paul v. Davis, 424 U.S. 693, 713 (1976), where the Court declined to find any infringement of privacy when plaintiff's name was included on a circular of active shoplifters compiled by police from arrest records. The Court held the injury to plaintiff's reputation was far removed from the context in which the right of privacy had been given constitutional protection—matters of procreation and child rearing. Id. While the plaintiff might have had an action for defamation, he had no grounds on which to claim constitutional protection for such injury to reputation. Id. at 713-14. The case can be distinguished on its facts, however, because it dealt with the publication of an "official act," the arrest of the plaintiff. It thus belongs to the doctrine of Cox Broadcasting Corp. v. Cohn, supra, that the first amendment protects the publication of "information released to the public in official court records." Id. at 496.

155. See Maheu v. Hughes Tool Co., 384 F. Supp. 166, 171-72 (C.D. Cal. 1974).

156. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974), quoting Garrison v. Louisana, 379 U.S. 64, 77 (1964); see Rosemont Enterprises, Inc. v. Irving, 49 App. Div. 2d 445, 449, 375 N.Y.S.2d 864, 868 (1st Dep't 1975) ("The right of privacy under the law was never contemplated to exclude or limit, within reasonable bounds, the right to speak and write concerning a public figure.").

157. See pt. II(C)(2) infra.

158. In the recorded federal cases in 1976 punitive damage verdicts as large as $50,000 were

part of the *New York Times* test—reckless disregard of the truth—sufficiently protects the media from the chilling effects of such damages in public figure and public official cases. The reckless disregard standard is likely to be misapplied in cases where the publisher's conduct has been in some way reprehensible or morally blameworthy. In such a case the jury is likely to return a large punitive damage award only to satisfy its sense of moral outrage, and an appellate court may uphold the result on the basis of circumstantial evidence only because it is reluctant to disturb the judgment of the trier of fact.[160] This compounds the chilling effects of punitive damages, because large damage awards in the reported cases are an invitation to litigation even though a plaintiff has only a slim hope of satisfying the *New York Times* requirements.[161]

The initial problem lies with the jury. A jury intent on punishing the defendant with a damage award may circumvent the reckless disregard instruction simply by ignoring it.[162] If the parties to the action are themselves either generally respected or generally disliked, the jury may use public opinion as a guide for returning a damage award. Popular public figure plaintiffs such as a respected war hero[163] and a nationally known football coach[164] have recovered huge punitive awards, while a jury assessed $75,000 in punitive damages based on one dollar in actual damages in a suit against a small magazine publisher associated with pornography.[165]

Appellate courts often uphold punitive damage awards in public figure or public official cases even though there may be considerable questions as to whether the *New York Times* standard has been satisfied or not. The standard

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affirmed for libel. Collins v. Retail Credit Co., 410 F. Supp. 924, 936 (E.D. Mich. 1976). The court reduced the jury's punitive damage award of $300,000. Id.

159. In the recorded federal cases in 1976 the ratio of compensatory to punitive damages in libel cases ranged from a low of two-to-five, see Collins v. Retail Credit Co., 410 F. Supp. 924, 936 (E.D. Mich. 1976), to a high of one-to-one thousand, see Buckley v. Littell, 539 F.2d 882, 897 (2d Cir. 1976), cert. denied, 97 S. Ct. 785 (1977).

160. See Buckley v. Littell, 539 F.2d 882, 896 (2d Cir. 1976), cert. denied, 97 S. Ct. 785 (1977). The inferences which the court made in finding reckless disregard may be questioned. See notes 173-74 infra and accompanying text. Perhaps for this reason the court concluded its discussion of liability by stating it was reluctant to disturb the trial court, since it had no opportunity to observe the demeanor of the witnesses.

161. Most libel cases are settled before they reach trial. It is estimated that less than 0.5 percent of all libel actions filed are litigated. Donnelly, The Right of Reply: An Alternative to an Action for Libel, 34 Va. L. Rev. 867, 869 n.5 (1948).

162. 10 Suffolk U.L. Rev. 126, 140 (1975).

163. Reynolds v. Pegler, 223 F.2d 429 (2d Cir.), cert. denied, 350 U.S. 846 (1955). The plaintiff received a total of $175,000 in punitive damages based on one dollar in compensatory damages. Id. at 431.

164. Curtis Publishing Co. v. Butts, 388 U.S. 130, 138 (1967) (three million dollars in punitive damages, reduced on remittitur to $400,000).

165. Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970). The jury assessed $25,000 in punitive damages against Ginzburg and $50,000 against a defendant magazine, of which he was the sole stockholder. Id. at 328. Ginzburg was prosecuted on obscenity charges in connection with his more erotic publications and unsuccessfully appealed his conviction to the Supreme Court. See Ginzburg v. United States, 383 U.S. 463 (1966).

requires proof of a "state of mind" in those persons who are responsible for the publication.[166] Since a defendant would seldom admit that he knowingly or recklessly published a falsehood, the plaintiff must rely on circumstantial evidence to prove the required mental state.[167] The defendant's state of mind must be *inferred* from this evidence. Since there is considerable leeway in making such inferences, the court may uphold a jury's punitive damage award without clear and convincing evidence of reckless disregard[168] if it believes the publisher engaged in such blameworthy conduct as failing to investigate,[169] irresponsible reporting,[170] or an intent to injure the plaintiff's reputation.[171]

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166. New York Times Co. v. Sullivan, 376 U.S. 254, 287 (1964); accord, St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (proof "that the defendant in fact entertained serious doubts as to the truth of his publication.").

167. 390 U.S. at 732; Vandenburg v. Newsweek, Inc., 507 F.2d 1024, 1026 (5th Cir. 1975).

168. The New York Times standard requires proof of reckless disregard with "convincing clarity." New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964); Hotchner v. Castillo-Puche, Civil No. 76-7479, at 2526 (2d Cir., March 23, 1977).

169. See Fopay v. Noveroske, 31 Ill. App. 3d 182, 196, 334 N.E.2d 79, 91 (1975). The Supreme Court has expressly stated that failure to investigate does not establish liability under the New York Times test. St. Amant v. Thompson, 390 U.S. 727, 731 (1968). Some courts, however, have in effect required a duty to investigate by finding liability even though the publisher relied on a reasonably trustworthy source. See Montandon v. Triangle Publications, Inc., 45 Cal. App. 3d 938, 120 Cal. Rptr. 186, cert. denied, 423 U.S. 893 (1975), where punitive damages were upheld even though the libelous statement originated in a press release composed by a television producer. The producer was in a better position to know the facts than the editors of the defendant publication, who relied on the press release and made only slight changes. 45 Cal. App. 3d at 941-42, 120 Cal. Rptr. at 188. Similarly, courts have found reckless disregard when a newspaper printed letters to the editor containing defamation, Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 91-92, 538 P.2d 450, 453 (en banc), cert. denied, 423 U.S. 1025 (1975), and when telephone callers on a "call and comment" radio program uttered libelous statements, Snowden v. Pearl River Broadcasting Corp., 251 So. 2d 405, 410-11 (La. App. 1971). The Supreme Court had earlier reached a result inconsistent with the Snowden decision without any discussion of the first amendment in a case construing the Federal Communications Commission's Fairness Doctrine. The Court held a broadcaster is not liable for defamatory remarks uttered by a political candidate using the broadcaster's facilities to exercise his right of reply under the Fairness Doctrine. Farmers Educ. & Cooperative Union v. WDAY, Inc., 360 U.S. 525, 531-35 (1959).

170. See Montandon v. Triangle Publications, Inc., 45 Cal. App. 3d 938, 949, 120 Cal. Rptr. 186, 193, cert. denied, 423 U.S. 893 (1975) ("While this result was apparently not intentional, it was one which those responsible should have foreseen . . . ."); Durso v. Lyle Stuart, Inc., 33 Ill. App. 3d 300, 304, 337 N.E.2d 443, 447 (1975) ("The existence of actual malice may be inferred where a defamatory publication is made without the proper cause or excuse."). The Durso decision relied on the responsible publisher standard set out in Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967), which had been abandoned by the Supreme Court one year before Durso was decided. See note 6 supra.

171. See Autobuses Internacionales S de R.L., Ltd. v. El Continental Publishing Co., 483 S.W.2d 506 (Tex. Civ. App. 1972), where the key consideration in reversing summary judgment for the defendant was that the newspaper had planned a campaign "to destroy [plaintiff's] business by libelous articles." Id. at 509.

A number of cases are illustrative. One court upheld punitive damages where the publisher printed allegations that the public official plaintiff was involved in a crime even though it is questionable whether the evidence showed the publisher had substantial doubts of the truth of the allegation when it was published.[172] In another case there was a history of bitter political exchanges between the parties and it appeared the defendant might have intentionally set out to injure the public figure plaintiff's reputation.[173] The court upheld a punitive damage award even though much of the evidence indicated the defendant believed the statement to be true.[174] Another court affirmed a jury's award of punitive damages to a public figure on little more than an assertion that the publisher recklessly disregarded the truth of the article.[175] The court placed more emphasis on facts showing the defendant had a clear motive for libeling the plaintiff.[176] In another case the confusion

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172. See Cape Publications, Inc. v. Adams, 336 So. 2d 1197 (Fla. App. 1976), where $100,000 in punitive damages was upheld against a newspaper. The reporter had based his story about political misconduct on five sources. However, at trial three of the sources contradicted the reporter's testimony and denied they had given him any information. In finding actual malice had been established, the court stressed the fact that the reporter had said he was going to "get " the plaintiff and "put him in jail." Id. at 1199.

173. See Buckley v. Littell, 394 F. Supp. 918 (S.D.N.Y. 1975), modified, 539 F.2d 882 (2d Cir. 1976), cert. denied, 97 S.Ct. 785 (1977). Both the trial and appellate court devoted extensive space to discussing the inflamatory opinions which the defendant published about the plaintiff, 394 F. Supp. at 923-24, 539 F.2d at 887, even though as opinions they were found not actionable. 539 F.2d at 895. Both courts noted the bitter exchanges between the parties prior to the defamatory publication. 394 F. Supp. at 923, 539 F.2d at 887. The trial court, in fact, expressly took this evidence of the defendant's motives into consideration in finding that reckless disregard had been shown. 394 F. Supp. at 932. This was probably error, since the Supreme Court has consistently stated that ill will, spite or intent to injure are not part of the New York Times test. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 n.18 (1971); Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 9-11 (1970).

174. The defendant was charged with publishing an assertion that the plaintiff, a newspaper columnist, practiced libelous journalism. There was evidence that the plaintiff had been sued in the past for libel, and one suit against him had been successful. 539 F.2d at 896. In addition, the defendant testified that he did not think any reader would interpret the allegedly libelous passage to mean that the plaintiff lied in his news columns. He thought the reader would conclude instead that the plaintiff "goaded" people in his columns. There was evidence that the plaintiff had attacked certain persons in print and thereby had "goaded" them. 394 F. Supp. at 939-40.

175. See Appleyard v. Transamerican Press, Inc., 539 F.2d 1026 (4th Cir. 1976), cert. denied, 97 S. Ct. 740 (1977). The allegedly libelous statement on which the court based its holding was that the plaintiff had caused the proceeds from a fund raising drive to be "channeled to a special bank account" that the plaintiff had opened. Id. at 1029. To demonstrate that the publisher knew this was false, the court relied on evidence that the plaintiff did not know of plans to change bank accounts until he was informed of it by "an employee" of the defendant publication. At that time the plaintiff "expressed his opposition to the change." Id. The court concluded that "[t]his testimony provides sufficient support for the jury's general finding that [defendant] published [statements] with . . . reckless disregard for their truthfulness." Id.

176. The plaintiff and defendant had planned the fund raising campaign together, but they had a "falling out." As a consequence the plaintiff set up a separate fund raising account. Shortly

of the name of the plaintiff, a public official, with the name of an underworld figure was held to be reckless disregard, even though the mistake was reasonable and the two names differed only by middle initials.[177] There is language in the opinion which suggests the punitive damage award was upheld because the author had intentionally set out to tarnish the reputation of public officials by linking them with organized crime.[178] In these cases it appears that the court relied more on evidence of the defendant's morally blameworthy behavior in awarding punitive damages than on evidence that the defamation was published with reckless disregard of truth.

The chilling effect of punitive damages is compounded by such results, because non-meritorious suits are encouraged.[179] Suits are sometimes filed without even a pretense of proving actual damages, solely in the hope that the jury will award sufficient punitive damages to make litigation worthwhile.[180] Other actions have been brought even though the plaintiffs had little hope of proving knowledge of falsity or reckless disregard of the truth.[181] Such suits are filed in hope that the publisher will settle rather than face the threat of punitive damages in court. It is submitted that they would not have been filed had the award of punitive damages been restricted beyond the requirements of *New York Times*.

C. *Requirement of Intent to Injure in Public Figure and Public Official Cases*

The vast majority of the news media's daily output consists of routine facts and opinions generated by public officials and other newsmakers who are *quoted* in newspapers and on broadcast news programs.[182] In such cases,

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thereafter the defendant published two "uncomplimentary" news articles about the plaintiff. Id. at 1028.

177. Durso v. Lyle Stuart, Inc., 33 Ill. App. 3d 300, 337 N.E.2d 443 (1975). The court even pointed out that it was not clear that the author was aware that there were two Thomas Dursos when he wrote the book. Id. at 305, 337 N.E.2d at 447. The court admitted at one point that "the publisher . . . had no knowledge of the truth or falsity of the statement regarding the plaintiff . . . ." Id. at 302, 337 N.E.2d at 445.

178. Id. at 305, 337 N.E.2d at 447.

179. Maheu v. Hughes Tool Co., 384 F. Supp. 166, 170 (C.D. Cal. 1974). Libel plaintiffs have few compunctions about asking for large punitive damage awards. E.g., Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (D.D.C. 1976) (ten million dollars requested).

180. Buckley v. Littell, 394 F. Supp. 918, 945 (S.D.N.Y. 1975), modified, 539 F.2d 882 (2d Cir. 1976), cert. denied, 97 S. Ct. 785 (1977) (plaintiff presented "no evidence whatever" of injury to his reputation).

181. See McCarney v. Des Moines Register & Tribune Co.,——Iowa——, 239 N.W.2d 152, 156 (1976) ("There is a complete absence of any facts in the record before us from which a finding of actual malice could be made."); James v. Gannett Co., 40 N.Y.2d 415, 353 N.E.2d 834, 386 N.Y.S.2d 871 (1976). In the latter case it is doubtful the plaintiff entertained any strong hope of proving publication with knowledge of falsity or reckless disregard of the truth because she herself had given the alleged defamatory statements to the newspaper reporter, who accurately reported them.

182. The traditional role of the media has been the "objective presentation of information and

where there is no intent to harm the individual quoted, the media should be allowed maximum freedom in reporting the news. Compensatory damages to public figures or public officials should be restricted to those libels published with knowledge of falsity or reckless disregard of the truth,[183] and punitive damages should not be awarded.

The media occasionally play a different role, however, when they campaign against a political official and his policies. The objective reporter of facts and opinions then seeks to influence the course of public events.[184] In some such cases it might be possible for a plaintiff to prove that the publisher intentionally set out to injure his reputation.[185] The power of the media to injure an individual's reputation is perhaps greatest in such cases.[186] If the publisher

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opinion supplied by high-level official sources." B. Schmidt, Freedom of the Press vs. Public Access 57 (1976) [hereinafter cited as Schmidt]. Newspapers rely extensively on official sources and fill their columns with factual information contained in press releases. Most journalists convey the opinions of their news sources and make no attempt of their own to influence public opinion. See Grant, The "New Journalism" We Need, 9 Colum. Journalism Rev., Spring 1970, at 12-13; Jones, Filling Up the White Space, 14 Colum. Journalism Rev., May/June 1975, at 10; Wicker, The Greening of the Press, 10 Colum. Journalism Rev., May/June 1971, at 7. Substantial news coverage is given to such factual information as real estate, food, fashion and trade news, weather and accident stories. See Bagdikian, Fat Newspapers and Slim Coverage, 12 Colum. Journalism Rev., Sept./Oct. 1973, at 15; Samuelson, Is It Time to Bury the Holiday Death Watch?, 14 Colum. Journalism Rev., Nov./Dec. 1975, at 11. One study found 70 percent of all weekday news items were used by more than one television network. Lemert, Content Duplication by the Networks In Competing Evening Newscasts, 51 Journalism Q. 238 (1974). "It appears as if the most routine, cut-and-dried stories were the ones which were covered by everybody, and there weren't many other kinds of stories on the network news." Id. at 244.

183. In addition, it is submitted that the common-law presumption of damages should be replaced by a requirement of proof of actual injury such as the Supreme Court now requires for private figure plaintiffs. See notes 276-88 infra and accompanying text.

184. Some commentators predict the future will see an increase in investigative journalism. See Schmidt, supra note 182, at 58-62. However, it is likely that the high cost of investigative journalism will force publishers and broadcasters to continue to rely on official sources for the majority of their news. Even on radio stations devoted entirely to news, "a reporter is almost never sprung loose for investigative or enterprise reporting. At $20,000 a year and up, reporters are too valuble to put on one story for three months. Few reporters are given the time even to become specialists, to develop a beat, or to do occasional analysis of important local events or trends." Powers & Oppenheim, The Failed Promise of All-News Radio, 12 Colum. Journalism Rev., Sept./Oct. 1973, at 27.

185. See, e.g., Sprouse v. Clay Communication, Inc., 211 S.E.2d 674 (W. Va), cert. denied, 423 U.S.882 (1975), where the evidence showed a newspaper made a "deliberate effort" to present facts about a political candidate's financial transactions in a manner which would make them appear improper. Id. at 690. The court found it was "the intent of the editors" to impugn the plaintiff's integrity. Id. at 686.

186. The performance of the press during the Watergate scandal is perhaps the most dramatic demonstration of the media's power when it campaigns against individual politicians. See Potter Stewart on the Press: Not Merely a 'Neutral Conduit,' 13 Colum. Journalism Rev., Jan./Feb. 1975, at 38. The potential for injury to reputation is perhaps the greatest in the case of television, which "has become the symbol of the media's mammoth power in the post-industrial age." Schmidt, supra note 182, at 120. The recognition that an investigative journalism exposé on

acted with *both* intent to injure and knowledge of falsity or reckless disregard of the truth then punitive damages may be justified as a deterrent. But when only one of these elements is present, punitive damages should be withheld as a remedy on constitutional grounds. Such a result would allow a publisher to campaign against a public official without fear of an arbitrary punitive damage award as long as the publisher entertained no substantial doubts about the truth of his articles.[187] But in those few cases where a publisher uses facts which he knows to be false or whose truth he substantially doubts in an attempt to injure the reputation of a public figure or public official, then punitive damages should be awarded as a deterrent. Punitive awards would be reserved for the narrow area where both the *New York Times* elements and intent to injure were present.

It is clear that there is no constitutional protection for a libel published with both *New York Times* actual malice and intent to injure. Such a libel is "calculated falsehood," which the Supreme Court has repeatedly stated never enjoys first amendment protection.[188] The consistent use of the word "calculated" indicates the Court may have intended to distinquish this category of speech from that encompassed by the *New York Times* test—speech published with knowledge of falsity or reckless disregard of the truth.[189] Calculated falsehood implies something more than knowledge that speech is false. It implies a scheme or plan to injure.

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television would be significantly more damaging to an individual's reputation than a similar newspaper report has no doubt influenced some libel decisions. In Credit Bureau v. CBS News, 332 F. Supp. 1291 (N.D. Ga. 1971), for example, a television network compiled an investigative report on the credit agency industry. Part of the broadcast was an interview with a high level industry representative, who stated that activities engaged in by the plaintiff credit agency violated industry guidelines. In fact, the spokesman misquoted the guidelines. Even though there was no evidence that the network was aware of the mistake, the court found there was a jury question whether or not the network published a libel with reckless disregard of the truth. Id. at 1297-98. One explanation for this result could be that the court was reacting to the tremendous harm such an accusation made by a national television network could do to a credit agency doing business by mail.

187. Such activity by the news media is seen as a fundamental part of our political process. While some Americans may have believed President Nixon was "hounded out of office" by the press, for example, Justice Stewart asserted that the press was performing "precisely the function it was intended to perform by those who wrote the First Amendment of our Constitution." Potter Stewart on the Press: Not Merely a 'Neutral Conduit,' 13 Colum. Journalism Rev., Jan./Feb. 1975, at 38.

188. See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971); Time, Inc. v. Hill, 385 U.S. 374, 389-90 (1967); Garrison v. Louisiana, 379 U.S. 64, 75 (1964). The Court applied the standard in Cantrell v. Forest City Publishing Co., 419 U.S. 245, 253 (1974), an invasion of privacy case. The reporter wrote a news feature about the plaintiff, fabricating details to make her life appear destitute and attributing quotes to her and describing her face as "a mask of non-expression" even though he had not interviewed her or seen her. Id. at 248. This action by the reporter, which might have been described as reporting with intent to injure if it were a libel case, was found to be "calculated falsehood" outside the area of constitutionally protected speech. Id. at 253.

189. See note 4 supra and accompanying text.

There is support in the cases for the assertion that punitive damages in libel should be constitutionally conditioned on a showing that the publisher acted with some form of intent to injure. The most explicit is *Maheu v. Hughes Tool Co.*,[190] which stated in a dictum that punitive damages could be awarded to private figure plaintiffs only when the publisher exhibited "reprehensible conduct that is motivated by ill will, or is accompanied by malice, fraud, or oppression."[191] Similar language can be found in *Sprouse v. Clay Communication, Inc.*,[192] where the court reversed an award of punitive damages to a public figure on constitutional grounds. The court declined to hold punitive damages unconstitutional in all cases, because such damages may be necessary to deter "willful and reckless conduct" in some cases.[193] In *Rosenbloom* Justice Harlan recognized that while punitive damages have a chilling effect on the media, they still have a limited place in libel law to deter "morally blameworthy" behavior.[194]

Maheu's test is nearly a restatement of the common-law rule of "malice"—that punitive damages are awarded only on a showing of spite, ill will or an intent to harm for its own sake.[195] *Maheu* elevated the requirement to constitutional status by holding that when a publisher engages in such reprehensible conduct he invades the plaintiff's right of privacy. In such a case the courts must balance the right of privacy with first amendment freedoms and an award of punitive damages is justified in spite of the chilling effects it produces.[196]

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190. 384 F. Supp. 166 (C.D. Cal. 1974).

191. Id. at 172.

192. 211 S.E.2d 674 (W. Va.), cert. denied, 423 U.S. 882 (1975).

193. Id. at 692. The court found the defendant newspaper had participated in a "plan or scheme to discredit the character of a political candidate . . . ." Id. at 680. The fact that the holding concerning punitive damages was framed in the traditional concepts of common-law malice was critically noted at 78 W. Va. L. Rev. 247, 253 (1976).

194. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 73 (1971) (dissenting opinion). In his earlier opinion, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), Justice Harlan endorsed the idea that common-law malice should be required as a condition to an award of punitive damages. He wrote that "punitive damages require a finding of 'ill will' under general libel law and it is not unjust that a publisher be forced to pay for the 'venting of his spleen' " with an award of punitive damages. Id. at 161. In addition, Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974) can be read as impliedly approving a condition of common-law malice to an award of punitive damages. In that case the trial court had allowed compensatory claims because actual malice had been proven, but it dismissed the claims for punitive damages because common-law malice had not been shown. Id. at 251-52. The court of appeals reversed, but the Supreme Court affirmed the judgment of the trial court. Id. at 254.

195. The court defined the required showing for an award of punitive damages as "reprehensible conduct that is motivated by ill will, or is accompanied by malice, fraud, or oppression." 384 F. Supp. at 172 (footnote omitted). Note the similarity between this language and Prosser's statement of conduct required at common law as a prerequisite to an award of punitive damages: "aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive . . . ." Prosser, supra note 15, § 2, at 9-10 (footnotes omitted).

196. 384 F. Supp. at 171-72. See also Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975).

It could be argued that an added requirement that a jury be instructed on intent to injure with respect to the issue of punitive damages would introduce an element of complexity into an area of law already burdened by too many distinctions.[197] But an additional instruction that if the jury is to punish the defendant it must find that he acted with intent to injure, is grasped easily and can be applied almost intuitively. The Supreme Court was willing to introduce a double jury instruction into private figure cases in *Gertz*, where it allowed the states to permit liability on a negligence instruction but still required the *New York Times* test for punitive damages. Any additional complexity in public figure and public official cases would be justified by the added protection a condition of proving intent gives to media threatened by arbitrary awards of punitive damages.[198]

1. Common-Law Malice

The result suggested above—that punitive damages be conditioned on a showing that the publisher intended to harm the plaintiff—may be stated in traditional common-law terms: before punitive damages are awarded in tort cases "malice" must be shown. This requirement of common-law malice has survived the extensive rewriting of libel law since *New York Times*, and it still appears in the lower court libel cases. It indicates support for the proposition that an additional requirement of intent to injure be added to the *New York Times* liability requirements before punitive damages are awarded to public figures or public officials.

There has been considerable confusion over the use of the term "malice" in libel law.[199] The test adopted in *New York Times*—knowledge of falsity or reckless disregard of the truth—was characterized by the Court as a rule of "actual malice."[200] This term was often confused with common-law malice, which conditions an award of punitive damages on some showing of intent to injure.[201] The basis of the distinction is that actual malice is a liability standard which turns on the defendant's attitude toward the *truth*. Common-law malice is a description of certain aggravated behavior punishable with damages and turns on the defendant's attitude toward the *plaintiff*.[202] It is

197. See Cantrell v. Forest City Publishing Co., 419 U.S. 245, 255 (1974) (Douglas, J., dissenting) ("To make the First Amendment freedom to report the news turn on subtle differences between common-law malice and actual malice is to stand the Amendment on its head."); Jacron Sales Co. v. Sindorf, 276 Md. 580, 593, 350 A.2d 688, 696 (1976); 78 W. Va. L. Rev. 247, 257-58 (1976). Some of the confusion might be due merely to the similarity between the terms actual malice and common-law malice. For an example of how confusing these terms can become see Rush-Hampton Indus., Inc. v. Home Ventilating Institute, 419 F. Supp. 19, 22 (M.D. Fla. 1976). Substituting the term intent to injure for malice in the common-law sense and instructing the jury that it must find a spiteful intent to injure the plaintiff's reputation before awarding punitive damages would resolve much of this confusion.

198. 418 U.S. at 347-50.

199. See Prosser, supra note 15, § 115, at 794; Eaton, supra note 12, at 1370 n.91.

200. 376 U.S. at 280.

201. Prosser, supra note 15, § 2, at 9.

202. Cantrell v. Forest City Publishing Co., 419 U.S. 245, 251-52 (1974); Carson v. Allied

now well established that the two standards are distinct entities,[203] and the Supreme Court will not accept proof of common-law malice as sufficient to establish actual malice.[204]

The Supreme Court's libel decisions may be read as abrogating the rule of common-law malice and replacing it with actual malice.[205] Thus lower courts often hold that evidence of actual malice will support an award of punitive damages,[206] even though common-law malice was required at common law. However, the state courts have been slow to put aside the common-law concept. Some courts, rather than *replacing* common-law malice with actual malice, have made actual malice an *additional* standard.[207] One court has gone so far as to hold that evidence of common-law malice will "help prove"

News Co., 529 F.2d 206, 209 (7th Cir. 1976); see Williams v. Trust Co., 230 S.E.2d 45, 52 (Ga. App. 1976).

203. Cahill v. Hawaiian Paradise Park Corp., 56 Hawaii 522, ——, 543 P.2d 1356, 1365 (1975); Rose v. Koch, 278 Minn. 235, 252, 154 N.W.2d 409, 421-22 (1967) (common-law malice is neither a substitute for actual malice nor "appropriate instruction as to the meaning of that constitutional standard."); see Adams v. Frontier Broadcasting Co., 555 P.2d 556, 563 (Wyo. 1976).

204. Letter Carriers Local 496 v. Austin, 418 U.S. 264, 281 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 n.18 (1971); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967) (per curiam).

205. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 395-96 (White, J., dissenting); see also Curtis Publishing Co. v. Butts, 388 U.S. 130, 161 (1967), where the plurality opinion referred to " 'ill will' [malice] under general libel law" as if it were a standard which had been eclipsed by the constitutional test. Gertz could be read as suggesting that actual malice may eventually be set as the standard for the recovery of presumed or punitive damages in private figure cases. See 418 U.S. at 350; Appleyard v. Transamerican Press, Inc., 539 F.2d 1026, 1030-31 (4th Cir. 1976), cert. denied, 97 S. Ct. 740 (1977) (concurring opinion); but see note 85 supra and accompanying text.

206. Martin v. Griffin Television, Inc., 549 P.2d 85, 93 (Okla. 1976); Fopay v. Noveroske, 31 Ill. App. 3d 182, 198, 334 N.E.2d 79, 92 (1975). The Illinois court qualified its holding, however, by adding, "this is not to say that the States may not impose greater or additional tests [than actual malice] as a condition to the recovery of punitive damages." Id. at 197, 334 N.E.2d at 92. Some commentators have interpreted Gertz as replacing the common-law condition to awarding punitive damages with a requirement that New York Times actual malice be shown. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 395-96 (1974) (White, J., dissenting); Comment, Gertz v. Robert Welch, Inc.: New Contours on the Libel Landscape, 5 N.Y.U. Rev. of L. & Social Change 89, 105 (1976). The tendency of the courts to extend the actual malice standard into other areas of libel law is demonstrated by cases such as Schulze v. Coykendall, 218 Kan. 653, 660-61, 545 P.2d 392, 398-99 (1976), which held actual malice will defeat a common-law privilege. See Eaton, supra note 12, at 1441.

207. Thus, one court held that actual malice will defeat a common-law privilege, but it is "not the exclusive test for abuse of a conditional privilege." Jacron Sales Co. v. Sindorf, 276 Md. 580, 600, 350 A.2d 688, 699 (1976) (punctuation omitted); see Eaton, supra note 12, at 1440. Similarly, one court has held either actual malice or common-law malice will defeat a privilege. Roemer v. Retail Credit Co., 44 Cal. App. 3d 926, 936, 119 Cal. Rptr. 82, 88 (1st Dist. 1975). See also Sanborn v. Chronicle Publishing Co., 17 Cal. 3d ——, 134 Cal. Rptr. 402, 405-06, 556 P.2d 764, 767-68 (1976) (applying common-law malice as a standard to defeat privilege); Eaton, supra note 12, at 1371.

actual malice.[208] Others apparently still require a showing of common-law malice to support an award of punitive damages in libel.[209] Such cases illustrate a consensus in the courts that actual malice is "less evil"[210] than common-law malice and less suitable as a standard for punishing the defendant.

Thus, if the concept of punishing speech retains any validity at all under the first amendment,[211] then it is arguable that it should at least be conditioned upon a showing of intent to injure as defined by the common-law malice cases.

2. Public Person's Right of Privacy

When an individual becomes a public figure or a public official he subjects himself to "closer public scrutiny" of his personal attributes and character.[212] Therefore his right to be free from unauthorized intrusion or prying by the news media into his affairs is considerably less extensive than that of a private figure, although he has not surrendered it completely.[213] If, for example, a newspaper embarked on a campaign of publishing libels about a political candidate in order to influence an election, it could be said the candidate's privacy—his right to be let alone—had been invaded. Only in such rare cases, when the publisher's "highly motivated, tortious conduct"[214] constitutes an unauthorized intrusion into the affairs of a public figure or public official, may punitive damages be awarded as a deterrent despite their chilling effect on first amendment freedoms.[215]

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208. McFee v. Fleishman, Civil No. 45753, at 11 (Cal. Ct. App., Dec. 29, 1975), cert. denied, 97 S. Ct. 309 (1976).

209. See Appleyard v. Transamerican Press, Inc., 539 F.2d 1026, 1030 & n.4 (4th Cir. 1976), cert. denied, 97 S. Ct. 740 (1977); Buckley v. Littell, 394 F. Supp. 918, 945 (S.D.N.Y. 1975), modified, 539 F.2d 882 (2d Cir. 1976), cert. denied, 97 S. Ct., 785 (1977); Matthews v. Deland State Bank, 334 So. 2d 164, 166 (Fla. Dist. Ct. App. 1976); Wood v. Lee, 41 App. Div. 2d 730, 731, 341 N.Y.S.2d 738, 739 (1st Dep't 1973) (per curiam) (slander); cf. Bertot v. School Dist. No. 1, 522 F.2d 1171, 1185 (10th Cir. 1975) (refusing to impose penalty where it was not shown "defendants acted with a malicious intention to cause a deprivation of [first amendment] constitutional rights . . . .").

210. Kern v. News Syndicate Co., 20 App. Div. 2d 528, 244 N.Y.S.2d 665, 667 (1963) (per curiam).

211. See pt. I(A)(2) supra.

212. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

213. See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971); New York Times Co. v. Sullivan, 376 U.S. 254, 301-02 & n.4 (1964) (Goldberg, J., concurring).

214. See Maheu v. Hughes Tool Co., 384 F. Supp. 166, 172 (C.D. Cal. 1974).

215. These were the facts in Sprouse v. Clay Communication, Inc., 211 S.E.2d 674 (W. Va.), cert. denied, 423 U.S. 882 (1975). The court found the defendant newspaper had foresworn "its role as an impartial reporter of facts" and participated in a "plan or scheme to discredit the character of a political candidate . . . ." Id. at 680. Although the court reversed a $500,000 punitive damage verdict on constitutional grounds, it affirmed an award of $250,000 in presumed damages on the ground they functioned as a deterrent to such "willful and reckless" defamation. Id. at 692-93. Since there was no objective evidence of injury, it is possible that the jury used presumed damages to punish the defendant. See notes 276-88 infra and accompanying text. Thus

Such a result is suggested by the development of the tort of invasion of privacy. The tort was literally created in 1890 by a pair of legal scholars who reacted adversely to the "growing excesses of the press."[216] It developed into a number of distinct branches, one of which involves "prying or intrusion" into the affairs of the plaintiff.[217] The cases which have held the tort of invasion of privacy protects a fundamental right[218] have most often involved an unauthorized intrusion fact pattern.[219]

In the intrusion cases the tort is often defined more with reference to the behavior of the defendant than to the injured interest of the plaintiff. Often the defendant's acts are highly reprehensible,[220] and no doubt this element of

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Sprouse seems to have reached a result synonymous with the rule suggested here—when a newspaper publishes libel with a spiteful intent to injure the plaintiff as well as with a reckless disregard of the truth punitive damages may be awarded to even a public figure.

216. Prosser, supra note 15, § 117, at 802. The legal scholars, Samuel D. Warren and Louis D. Brandeis, believed the policy which justified the creation of the tort was the protection of individual reputations from the news media. "Of the desirability—indeed of the necessity—of some such protection [as the right of privacy], there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery." Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 196 (1890).

217. Prosser, supra note 15, § 117, at 807-08. Originally the intrusion-type cases were limited to invasions of the plaintiff's physical solitude. But the tort has expanded into other areas where plaintiff's well being is disturbed by an intrusion into his private affairs. See id.

Restatement (Second) of Torts §§ 652A-652E (Tent. Draft No. 13, Apr. 27, 1967) defines the four categories as unreasonable intrusion on the seclusion of another; appropriation of another's name or likeness; unreasonable publicity given to the other's private life, and publicity which unreasonably places the other in a false light before the public. See Prosser, supra note 15, § 117; Comment, Constitutional Right of Privacy and Investigative Consumer Reports: Little Brother is Watching You, 2 Hast. Const. L.Q. 773, 788-90 (1975) [hereinafter cited as Privacy].

218. See note 152 supra and accompanying text.

219. See York v. Story, 324 F.2d 450 (9th Cir. 1963), cert. denied, 376 U.S. 939 (1964) (circulating photograph's of plaintiff's nude body among police officers); In re Long, 55 Cal. App. 3d 788, 127 Cal. Rptr. 732, 735 (3d Dist. 1976) (female observers in toilet and shower areas of prison). The fact that some courts have found a fundamental right is involved on such fact patterns is not surprising, since the concept of intrusion often appears in the constitutional right of privacy cases. See Eisenstadt v. Baird, 405 U.S. 384, 453 (1972). One commentator has argued that Griswold v. Connecticut, 381 U.S. 479 (1965) is actually an intrusion type case. Note, Roe and Paris: Does Privacy Have a Principle?, 26 Stan. L. Rev. 1161, 1164-65 (1974). The idea of intrusion is central to the constitutional cases dealing with the privacy of the home. See Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("For also fundamental is the right to be free . . . from unwanted governmental intrusions into one's privacy."); Ravin v. State, 537 P.2d 494, 511 (Alas. 1975) ("The privacy of the individual's home cannot be breached absent a persuasive showing of a close and substantial relationship of the intrusion to a legitimate governmental interest."); see United States v. Maiden, 355 F. Supp. 743, 746-47 (D. Conn. 1973); Note, Roe and Paris: Does Privacy Have a Principle?, 26 Stan. L. Rev. 1161, 1185 (1974).

220. See Hamberger v. Eastman, 106 N.H. 107, 111-12, 206 A.2d 239, 241-42 (1964), where a landlord installed a microphone in the bedroom of his tenant's apartment. Professor Bloustein has argued that it is "the character of the interference" caused by the defendant which

outrageousness has influenced some courts to find the plaintiff's interest protected by the tort is a fundamental right.[221] *Galella v. Onassis*[222] is an example. Mrs. Jacqueline Kennedy Onassis, who if she had sued for libel would undoubtedly have been classified as a public figure, sued a photographer for invasion of privacy. A New York court held the photographer's dogged pursuit of the plaintiff was so outrageous that he could be enjoined from exercising his first amendment rights to gather news and photographs.[223] The key factor in the court's decision to infringe on the freedom of the press in the interest of privacy was the outrageousness of the defendant's acts.[224]

This principle may be applied to libel. When the publisher's conduct is so outrageous that it may be said he intentionally set out to injure the plaintiff's reputation, then there has been an intrusion into the affairs of the plaintiff which justifies the award of punitive damages in spite of their chilling effects on the press. Punitive damages may be constitutionally awarded to public figures and officials only in such narrow circumstances.

Such an analysis makes it clear why the *New York Times* test is too broad a standard for awarding punitive damages in libel. It does not restrict the award of punitive damages to the narrow case where the publisher's acts are

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distinguishes invasion of privacy from other torts which insult human dignity. Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U.L. Rev. 962, 1003 (1964). The "law of privacy attempts to preserve individuality by placing sanctions upon outrageous or unreasonable violations of the conditions of its sustenance." Id.

One consideration in the Supreme Court's decision to recognize a right to privacy in the use of contraceptives was the outrageous consequences which might follow: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

221. See, e.g., Nader v. General Motors Corp., 57 Misc. 2d 301, 292 N.Y.S.2d 514 (Sup. Ct. 1968), aff'd, 31 App. Div. 2d 392, 298 N.Y.S.2d 137 (1st Dep't 1969), aff'd, 25 N.Y.2d 560, 307 N.Y.S.2d 647, 255 N.E.2d 765 (1970), where the defendant corporation hired women to attempt to seduce one of its public critics, tapped his telephone, followed him and questioned his acquaintances. The Supreme Court held there was a violation of "a constitutional right of plaintiff to privacy—a right to be let alone." Id. at 305, 292 N.Y.S.2d at 518. The Court of Appeals applied the law of another jurisdiction which recognized a narrow right of privacy action, 25 N.Y.2d at 565-67, 255 N.E.2d at 768-69, 307 N.Y.S.2d at 651-53, and therefore did not reach the constitutional issue raised by the Supreme Court. The Court of Appeals, however, did recognize that aggravated conduct by the defendant was an element of the tort. It held that the mere observation of plaintiff was not actionable, but if the observation were "overzealous" it would constitute an invasion of privacy. 25 N.Y.2d at 570, 255 N.E.2d at 771, 307 N.Y.S.2d at 655.

222. 353 F. Supp. 196 (S.D.N.Y. 1972), modified, 487 F.2d 986 (2d Cir. 1973).

223. Id. at 223-24. "He was like a shadow: everywhere she went he followed her and engaged in offensive conduct; nothing was sacred to him . . . ." Id. at 210. The Second Circuit based its decision on a violation of New York's criminal harassment statute. 487 F.2d at 994-95. However, the court indicated that if there had been no such statute available it would have allowed the case to turn on an invasion of the right of privacy, which it suggested was a constitutional right. Id. at 995 n.12.

224. 353 F. Supp. at 207-14.

so outrageous that they constitute an invasion of the right to be free from aggravated intrusion. Even though he knew a statement was false or published it with reckless disregard for the truth, the defendant might not have spitefully intended to injure the plaintiff's reputation. An award of punitive damages conditioned only on the requirements of *New York Times* would not narrowly reach the conduct intended to be deterred. A more sensitive tool,[225] such as the additional condition of proving an intent to harm, is required.

III. SMALL AND SPECIALIZED MEDIA

The objections to punitive damages apply with particular force in the case of small media such as weekly newspapers, special interest magazines or small audience broadcast stations. Both the Supreme Court[226] and Congress[227] have in a certain sense recognized that small or financially ailing media might need special protection, but the Court has been reluctant to introduce economic arguments into first amendment law.[228] Lower courts have recognized, however, that the burden of damages is greater on small media.[229] In fact, the harshness of punitive damage awards on small publishers has been

225. Cf. Speiser v. Randall, 357 U.S. 513, 525 (1958) ("The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . .").

226. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 610 & n.40 (1976) (Brennan, J., concurring); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247-51 (1974); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 400-01 (1969); cf. Linn. v. Plant Guard Workers Local 114, 383 U.S. 53, 64 (1966).

227. See the Newspaper Preservation Act of 1970, 15 U.S.C. §§ 1801-04 (1970), in which Congress, in effect, sanctioned newspaper monopolies in certain cities in the interest of keeping failing papers from going out of business.

228. See Buckley v. Valeo, 424 U.S. 1, 49 (1976) (per curiam) ("The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."); but see Bigelow v. Virginia, 421 U.S. 809, 826 (1975); Valentine v. Chrestensen, 316 U.S. 52 (1942), where the Court allowed first amendment protection to turn on economic considerations by recognizing that speech which can afford to pay its own way is not entitled to as much protection as speech which is not "purely commercial advertising." Id. at 54. But see Baker, Commercial Speech: A Problem in the Theory of Freedom, 62 Iowa L. Rev. 1, 41 & n.143 (1976), which asserts the Court has apparently abandoned the commercial speech doctrine.

Especially where minority rights have been involved, the Court has allowed economic factors to enter into consideration of first amendment problems. See Associated Press v. United States, 326 U.S. 1 (1945), where it suggested a power exists in the first amendment which allows Congress to promote the "free flow of ideas" by enforcing antitrust laws against exclusive media combinations. Id. at 20. In Buckley, the Court had no problem finding the power under the Constitution to grant special exemptions from contribution disclosure requirements to minor political parties which can demonstrate that such disclosure would result in a decrease in contributions. 424 U.S. at 73-74 (dicta).

229. E.g., Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967) ("All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post . . . ."); cf. Buckley v. Littell, 539 F.2d 882, 897 (2d Cir. 1976), cert. denied, 97 S. Ct. 785 (1977); Smoot v. League of Women Voters, 36 F.R.D. 4, 5 n.1 (W.D Mich. 1964).

cited as a reason why such damages should be held unconstitutional.[230] Such concern merits a closer look at small media and the effect punitive damages have on them.[231]

There is no doubt that small and specialized media are an important part of the mass communications industry. Of the 11,400 newspapers published in the United States in 1975, there were 8,824 weeklies[232] with a combined circulation in excess of 26 million.[233] Suburban newspapers in the top ten markets increased in circulation by 80 per cent from 1945 to 1968, compared with an increase of 2 per cent for metropolitan dailies.[234] The number of FM radio stations, many of which are independently owned, has increased rapidly since 1950.[235] The growth of small media reflects a trend toward specialization. National magazines such as *Look* and *Life* have gone out of business, and national radio networks no longer dominate local programming.[236] There are also indications that small media serving specialized markets will continue to grow more rapidly than the mass audience media.[237]

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230. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 82 (1971) (Marshall, J., dissenting). It is perhaps noteworthy that one of the first cases to enunciate the rationale that punitive damages have a chilling effect on the media involved a bi-weekly special interest newspaper with a circulation of from 11,000 to 12,000. See Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 662 (D.C. Cir. 1966) (en banc).

231. Perhaps because large newspapers and broadcasters are more attractive defendants, there are relatively few reported cases dealing with small media defendants and fewer still in which punitive damages are an issue. In 1976, for example, only three cases arguably dealing with small media defendants were reported in the federal circuit courts, and only one of them dealt with punitive damages. Anderson v. Stanco Sports Library, Inc., 542 F.2d 638, 639 (4th Cir. 1976) (publisher of Detective Cases, apparently a monthly magazine); Appleyard v. Transamerican Press, Inc., 539 F.2d 1026, 1028-29 (4th Cir. 1976), cert. denied, 97 S. Ct. 785 (1977) (punitive damages against a monthly special interest magazine); Carson v. Allied News Co., 529 F.2d 206, 208 (7th Cir. 1976) (tabloid periodical). It cannot be concluded that the relative scarcity of reported cases means that the threat of libel does not induce self-censorship on the part of small media. It might be, for example, that the lack of cases is explained by a tendency of small media defendants to settle rather than to face the costs of litigation. In addition, the fact that even three libel suits reached the federal circuit courts in 1976 might cause a small publisher to pull back on the reins of his criticism of public officials or treatment of controversial issues.

232. See U.S. Bureau of the Census, Statistical Abstract of the United States: 1975, at 522 (96th ed. 1975). The number of newspapers from 1950 to 1975 has actually decreased. The number of periodicals, on the other hand, has increased from 6,960 to 9,657 from 1950 to 1975, with the greatest increases in the less frequently published periodicals. For example, while weeklies increased from 1,443 to 1,918, monthlies increased from 3,694 to 4,087 and bimonthlies increased from 436 to 1,009. Id.

233. An article published in 1968 estimated the combined circulation of 8,000 weeklies in the United States at 26 million. The Irrepressible Weeklies, 7 Colum. Journalism Rev., Summer 1968, at 30.

234. Schmidt, supra note 182, at 40.

235. Sterling, Trends in Daily Newspaper and Broadcast Ownership, 1922-1970, 52 Journalism Q. 247, 252-53 (1975).

236. Maisel, The Decline of Mass Media, 37 Pub. Opinion Q. 159, 167 (1973).

237. See id. at 159-61, where the author asserts that the growing demand for specialized

The statistics on the rapid growth of monopoly in the mass media, however, have overshadowed the importance of smaller publications in the eyes of the courts. The trend toward common ownership of newspaper chains and television networks has created a backlash against the expanding protection of the media under the first amendment.[238] Justice White concluded that the deterrent effect of libel law is a necessary check on the "awesome power" which media conglomerates have "placed in the hands of a select few."[239] However, researchers have found that the growth of media ownership chains has been accompanied by a corresponding growth in the number of smaller media outlets.[240] Even when adjustments for ownership have been made, research indicates that there are still more independent media "voices" than at any time in the past.[241]

A. *Small Media and Punitive Damages*

The objections to the arbitrary amounts of punitive damage awards have more force in the case of small publications, which would be less able to absorb a large judgment than, for example, a metropolitan newspaper chain.[242] The danger that an award of punitive damages may put a publisher

media reflects the growth of the service industries. As the economy continues to shift from a manufacturing and industrial stage toward a service-oriented phase, Maisel believes the demand for specialized media will increase. He predicts specialized media will eventually replace the mass media. See also J. Merrill & R. Lowenstein, Media, Message and Man 33-44 (1971).

238. Justice White's opinions are the most notable examples of this attitude on the Supreme Court. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 263 (1974) (concurring opinion) ("To me it is a near absurdity . . . to leave the people at the complete mercy of the press, at least in this stage of our history when the press . . . is steadily becoming more powerful and much less likely to be deterred by threats of libel suits."); Gertz v. Robert Welch, Inc., 418 U.S. 323, 402 (1974) (dissenting opinion). Some commentators have concluded that media monopoly has made the concept of the marketplace of ideas an anachronism. See Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641, 1647-48 (1967); Kelly, Criminal Libel and Free Speech, 6 U. Kan. L. Rev. 295, 330-31 (1958).

239. Gertz v. Robert Welch, Inc., 418 U.S. 323, 402 (1974) (dissenting opinion). Newspaper ownership has concentrated to the point where in 1968 single owners controlled newspapers in 95 per cent of American cities. In 1974 there were 60 American cities in which the monopoly newspaper owned a television station in the same city. In 250 cities in 1967 broadcast stations were controlled by local daily newspapers. Schmidt, supra note 182, at 40-41.

240. See Sterling, Trends in Daily Newspaper and Broadcast Ownership, 1922-1970, 52 Journalism Q. 247, 252-54 (1975). There has been a steady increase in the ratio of independent broadcast stations to multiply owned stations from 1950 to 1970. See id. at 254 & Table 3. The author projects, however, that this trend may be reversed after 1980. Id. at 254. In addition, since 1970 the historic decline in the number of large metropolitan daily newspapers has been offset by the rapid growth of suburban newspapers. Id. at 252.

241. Id. The study collected data on both media outlets and media "voices"—a voice being an owner who controlled one or more media outlets in a given market. Generally the increase in media outlets outpaced the increase in media voices, indicating a concentration in ownership. But the growth of new FM radio and television markets and the suburban press was so great that the authors were unable to claim support for their hypothesis that media ownership has become more concentrated since 1950. Id. at 249, 252-53.

242. A 1973 study showed half of all publications and broadcasters did not have libel

out of business is strongest in the case of small media.[243] In addition, the courts have recognized that small media such as minority political publications[244] or "underground" newspapers[245] are often vehicles which provide alternative viewpoints. Public opinion researchers have been able to measure the difference in viewpoints offered by smaller or independent media outlets.[246] Unpopular opinions are more likely to be circulated by small media

insurance. "Many of those who are not covered are those who need insurance most: new magazines, 'alternative' newspapers, and unconventional broadcasters." Anderson, The Selective Impact of Libel Law, 14 Colum. Journalism Rev., May/June 1975, at 42. Before a Bermuda insurance company entered the field in 1963 there was no insurance which the publishing industry considered adequate against punitive damages for libel. It was not until 1972 that such a policy was offered to weekly newspapers not owned by the American Newspapers Publishers Association. See Editor & Publisher, Nov. 2, 1974, at 11.

243. See Anderson, The Selective Impact of Libel Law, 14 Colum. Journalism Rev., May/June 1975, at 38. Smaller publications and "less conventional media voices . . . face a dilemma. If they are to survive, they must attract attention; to do that, they must tackle subjects not being covered by the established news organizations. In short, they must take risks. On the other hand, because of their financial insecurity, a libel suit, even though ultimately unsuccessful, would probably be fatal." Id. After spending three years litigating a libel action and winning, the editor of a medium-sized daily newspaper was quoted as saying, "If the . . . suit had been against a smaller and less financially-able newspaper, the costs of defending its basic right would have forced that newspaper out of business." Editor & Publisher, April 25, 1964, at 48. See also N.Y. Times, Oct. 21, 1976, at 79, col. 3, for an account of how "a newspaper [was] strangled by litigation." Similar considerations apparently played a central role in the decision of the Supreme Court of Appeals of West Virginia to hold punitive damages in libel actions unconstitutional. See Sprouse v. Clay Communication, Inc., 211 S.E.2d 674 (W. Va.), cert. denied, 423 U.S. 882 (1975). The court found that when an award of punitive damages might "jeopardize the existence of a newspaper" it violates the first amendment. Id. at 692. It found the punitive damage award involved was a repressive deterrent to the free press, "[p]articularly in West Virginia, where a large portion of the State is served by newspapers which lack substantial financial assets. . . ." Id. at 690.

The Supreme Court recognizes that a state policy which discriminates on the basis of wealth is more constitutionally suspect in the case where the policy results in a complete deprivation of an important right. Such deprivation is more likely to be unconstitutional than a case where "equal protection is denied to persons with relatively less money on whom designated fines impose heavier burdens." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 22 (1973). Thus the fact that arbitrary punitive damage verdicts not only impose a proportionately heavier burden on small media defendants but actually threaten "an absolute deprivation of" first amendment freedoms make such awards increasingly suspect. See id. at 23. Cf. Dandridge v. Williams, 397 U.S. 471, 522 (1970) (Marshall, J., dissenting).

244. Long v. Anaheim, 255 Cal. App. 2d 191, 198-99, 63 Cal. Rptr. 56, 61 (4th Dist. 1967) (The court refused to apply a non-discriminatory license tax to a non-profit political weekly newspaper whose "primary function . . . is to present the views of the Socialist Party to the paper's subscribers. . . ."); cf. Quad-City Community News Service, Inc. v. Jebens, 334 F. Supp. 8, 17 (S.D. Iowa 1971).

245. United States v. Head, 317 F. Supp. 1138 (E.D. La. 1970). In dismissing an obscenity indictment against an underground radical newspaper the court stressed that the paper was devoted to news reports, ideas and poetry and sought "to challenge, and to advocate departures from, the style of life now socially accepted by the nation's middle class." Id. at 1144.

246. See Nestvold, Diversity in Local Television News, 17 J. Broadcasting 345 (1973) (finding

than by large communications networks, which at least some commentators have argued must be "centrist" in their opinions to avoid alienating part of the market they provide for their advertisers.[247] If this is so, the power inherent in punitive damages to punish unpopular opinions is especially threatening to smaller media.[248]

Proponents of punitive damages argue that an arbitrary award will be corrected through judicial supervision. However, this argument is grounded in the faith that few judges will share a jury's predisposition to punish unpopular opinion. Small media have not always been treated charitably by public officials[249] or by the courts.[250] And when damages must be adjusted to the sensitive requirements of the first amendment one might, to borrow a phrase from Justice Powell, "doubt the wisdom of committing this task to the conscience of judges."[251]

It might also be said in defense of punitive damages that they may be adjusted to the size of the defendant under common-law rules of evidence in

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more potential diversity in news on television stations not affiliated with networks than on those which are so affiliated); Tichenor & Wackman, Mass Media and Community Public Opinion, 16 Am. Behavioral Scientist 593 (1973) (finding readers of suburban weekly newspapers have been shown to have different opinions on the same current issue than readers of metropolitan dailies serving the same area).

247. See Lange, The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment, 52 N.C.L. Rev. 1, 81-82 (1973); accord, Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641, 1661-63 (1967).

248. The fear of libel suits has been especially acute among operators of cable television channels. "These . . . fears, along with responsibilities for some control over access programming imposed by the [Federal Communications] Commission, have led cable operators to impose prescreening requirements, indemnification agreements, and other potentially restrictive controls." Schmidt, supra note 182, at 211.

249. See Forcade v. Knight, 416 F. Supp. 1025 (D.D.C. 1976) (underground press service reporter arbitrarily denied passes for White House press briefings); Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n, 365 F. Supp. 18 (D.D.C. 1973), rev'd on other grounds, 515 F.2d 1341 (D.C. Cir. 1975), cert. denied, 423 U.S. 1051 (1976); Quad-City Community News Serv., Inc. v. Jebens, 334 F. Supp. 8 (S.D. Iowa 1971) (underground bi-weekly newspaper with less than $10 in assets consistently denied access to police records which large media reporters were routinely allowed to examine); cf. Watson v. Cronin, 384 F. Supp. 652 (D. Colo. 1974).

250. See Freedman v. State Police, 135 N.J. Super. 297, 343 A.2d 148 (1975) for one court's thinly disguised distaste for a small nonestablishment university newspaper. Large awards of punitive damages are often routinely upheld against small defendants. See, e.g., Davis v. Schuchat, 510 F.2d 731, 732-33, 737-38 (D.C. Cir. 1975) ($1,500 in punitive damages based on $1 nominal damages against a freelance investigative journalist); Goldwater v. Ginzburg, 414 F.2d 324, 328 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970) ($1 actual and $75,000 punitive damages against small magazine and its publisher); Soderberg v. Halver, 276 Minn. 315, 316, 150 N.W.2d 27, 28 (1967) (holding that a "mimeographed circular" published at regular intervals and mailed to residents of a Minnesota village was a newspaper and subject to liability for punitive damages).

251. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974). The quote is taken from the discussion of an analogous question of whether or not the courts should be allowed to decide on an ad hoc basis whether the facts before them fit the Rosenbloom public interest test.

libel. Since evidence of the defendant's wealth is admissible on the issue of punitive damages,[252] in theory a jury would find that a smaller award would suffice as a deterrent against a small publisher. The rules for actual damages, upon which punitive damages are predicated, operate in a similar way. Evidence of the circulation of the defamatory statements can be admitted to allow the jury to calculate the extent of the injury to plaintiff's reputation.[253] Evidence of the power or prestige of a source of defamation can be admitted on the theory that defamation from an unknown source would cause little or no injury.[254] These rules on circulation and influence of a source may be of less use in future private figure libel cases, however, since *Gertz* now requires actual injury be proven with "competent evidence."[255] The rule allowing evidence of wealth may, in addition, inflame the jury.[256] A small media defendant might hesitate to introduce evidence of his assets for fear the jury might regard the figures merely as money from which it may draw the damage award. These rules are seldom applied, and even when they are the result often seems to be no less arbitrary.[257] From the point of view of small media defendants, then, the utility of these rules might be questioned.

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252. See note 30 supra and accompanying text.

253. Collins v. Brown, 268 F. Supp. 198, 202 (D.D.C. 1967) (slander judgment reduced by $20,000 because circulation of statement not as harmful as circulation by newspapers, television or radio); McCormick, supra note 84, § 117, at 426.

254. See Kennedy v. Item Co., 213 La. 347, 374, 34 So. 2d 886, 895 (1948); McCormick, supra note 84, § 117, at 429; cf. Campanella v. Pursley, 25 Misc. 2d 54, 57, 202 N.Y.S.2d 539, 542 (Sup. Ct. 1960) (readers may not rely on a small weekly newspaper).

255. 418 U.S. at 350. These common-law rules required the jury to make an inference of injury from facts about the size or influence of the source. But the reason Gertz required proof of actual injury was that the Court was dissatisfied with the discretion vested in the jury under the common-law rules of libel damages. Id. at 349. Such inferences may thus no longer be permissible. An example of what the Court meant by competent evidence was the evidence of emotional injury in Time, Inc. v. Firestone, 424 U.S. 448, 460-61 (1976).

256. McCormick, supra note 84, § 118, at 432; Morris, supra note 92, at 1209. Accordingly, when the rule is cited it is usually in the context of justifying a large award of punitive damages. See Dalton v. Meister, 52 Wis. 2d 173, 181-82, 188 N.W.2d 494, 498-99 (1971), cert. denied, 405 U.S. 934 (1972) (punitive damage award of $75,000 supported on evidence that defendant had assets of between 2 and 2.5 million dollars); Fawcett Publications, Inc. v. Morris, 377 P.2d 42, 53 (Okla. 1962), cert. denied, 397 U.S. 513 (1964) (no error to admit evidence of defendant's wealth in $50,000 punitive damage case). One problem with the rules allowing evidence of defendant's wealth, circulation or influence is that there are no objective standards for comparison. For example, one court stated that a newspaper circulation of 15,000 was "widespread publication . . . properly to be considered by the jury in arriving at the amount of the award." Rogers v. Florence Printing Co., 233 S.C. 567, 576, 106 S.E.2d 258, 263 (1958). However, circulation of 15,000 is small in terms of most daily newspapers.

257. See Collins v. Brown, 268 F. Supp. 198, 202 (D.D.C. 1967) (slander); Greenberg v. DeSalvo, 216 So. 2d 638, 643 (La. App. 1968), modified, 229 So. 2d 83 (Sup. Ct. 1969), cert. denied, 397 U.S. 1075 (1970) (increasing award); Fawcett Publications, Inc. v. Morris, 377 P.2d 42, 53 (Okla. 1962), cert. denied, 397 U.S. 513 (1964) (wealth); Rogers v. Florence Printing Co., 233 S.C. 567, 576, 106 S.E.2d 258, 263 (1958) (circulation).

B. *A Solution: Small Media Public Figures*

Public figures in small media cases are often defined with reference to the special characteristics of the media outlet. The courts may use circulation or the boundaries of the community served by the publication as a guideline. A high school principal is a public figure with respect to the high school newspaper.[258] Teachers are public figures when they file a libel action against a newsletter distributed to the academic community.[259] When two college professors took vocal stands during a campus dispute concerning the use of books by black authors, it was held they had become public figures for the limited purpose of suing the college newspaper for libel.[260]

The same approach is taken in cases involving specialized media defendants. If the plaintiff has thrust himself to the forefront of a controversy surrounding a certain topic, then he is a public figure for the purposes of a libel action against the small media defendant which generally covers that subject. When an individual organized a drive to change federal regulations affecting the trucking industry, he was treated as a public figure in a suit against *Overdrive*, a monthly magazine for truckers.[261] An opponent of fluoridation of water supplies, who had lectured and written on the subject, was a public figure in a suit against a medical journal which published an article on fluoridation.[262] Such treatment of the public figure question allows specialized media maximum freedom in reporting developments in the area of their expertise, because the plaintiff must meet the *New York Times* test to recover for libel.

This method of classification could offer a solution to the small media problem, depending on which rule the Supreme Court eventually adopts for awarding punitive damages. The most desirable rule would be that punitive damages are unconstitutional in public figure or public official cases absent

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258. Bright v. Unified School Dist., 124 Cal. Rptr. 598, 604 (2d Dist. 1975), rev'd on other grounds, 18 Cal. 3d 450, 556 P.2d 1090, 134 Cal. Rptr. 639 (1977).

259. Basarich v. Rodeghero, 24 Ill. App. 3d 889, 892, 321 N.E.2d 739, 742 (1974).

260. Johnson v. Board of Junior College Dist., 31 Ill. App. 3d 270, 276 & n.1, 334 N.E.2d 442, 447 & n.1 (1975).

261. Appleyard v. Transamerican Press, Inc., 539 F.2d 1026, 1029 (4th Cir. 1976), cert. denied, 97 S. Ct. 740 (1977).

262. Exner v. American Medical Ass'n, 12 Wash. App. 215, 529 P.2d 863 (1974); accord, Montandon v. Triangle Publications, Inc., 45 Cal. App. 3d 938, 941, 120 Cal. Rptr. 186, 188, cert. denied, 423 U.S. 893 (1975) (author and television personality a public figure for a libel suit against TV Guide).

See Adey v. United Action for Animals, Inc., 361 F. Supp. 457 (S.D.N.Y. 1973), cert. denied, 419 U.S. 842 (1974), where the plaintiff was a researcher at the University of California and a consultant to the government space program which put a monkey into orbit. He sued the publishers of a newsletter dealing with the "alternatives to the use of animals in research" which had a circulation of 3,000. Id. at 464. The court classified the plaintiff as a public official on the basis of his position as a government consultant. Id. at 461-62. The case could be put on a sounder basis, however, if the plaintiff were classified as a small media public figure with respect to the newsletter since he had published papers dealing with experiments on animals. See id. at 464-65.

intent to injure.[263] Punitive damages would then generally be allowed only in suits by private figures. Under the classification system of the above small media cases, however, it would be possible for a given individual to be treated as a private figure in a suit against a television network and as a public figure in a suit against a weekly newspaper serving his neighborhood. Thus, in the suit against the television network, the individual could recover punitive damages, provided he met the *New York Times* requirements. But the same individual would not be able to recover any punitive damages in a suit against the small media defendant newspaper absent intent to injure on the part of the publisher. This is the desired result. It offers maximum protection to small media defendants from the chilling effects of punitive damages. It also preserves punitive damages as a deterrent for those cases where a media conglomerate abuses its position of power and recklessly libels a private figure plaintiff. For purposes of a suit against a large national media defendant all persons except the very prominent and nationally known would be classified as private figures.

The application of these rules can be illustrated with the facts in *Time, Inc. v. Firestone*.[264] The plaintiff was a prominent member of the Palm Beach "sporting set"[265] and the wife of a wealthy industrialist.[266] She sued a national publication, *Time* magazine, for falsely reporting that her divorce was granted on grounds of adultery. The Supreme Court held that Mrs. Firestone was a private figure for the purposes of the suit, noting that she "did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society . . . ."[267] However, the result might have been different if Mrs. Firestone had sued the *Palm Beach News*, which at the time the Supreme Court heard arguments was a bi-weekly publication with a circulation of 2,932.[268] In that case she might well have been classified as a public figure because of the prominent role she had chosen to play in Palm Beach society. Thus under the rule of punitive damages suggested here, the local weekly newspaper would enjoy greater protection from punitive damages than the national news magazine.[269]

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263. See notes 182-255 supra and accompanying text.

264. 424 U.S. 448 (1976).

265. Id. at 485 (Marshall, J., dissenting).

266. Id. at 450.

267. Id. at 453.

268. See Editor & Publisher International Yearbook 62 (1975).

269. The facts in Edwards v. National Audubon Soc'y, Inc., 423 F. Supp. 516 (S.D.N.Y. 1976) may illustrate the same analysis in the case of a specialized media defendant. The three plaintiffs in the case were professors of biology, biochemistry and entomology at different universities. None of them had achieved national fame outside the academic sphere, but all three had published scientific articles dealing with the effects of DDT on bird life. The two co-defendants were the publishers of a specialized environmental journal, "American Birds," and a large metropolitan newspaper, The New York Times. The plaintiffs were found to be public figures for both actions. Id. at 517. However, the better result would have been to treat the plaintiffs as public figures with respect to "American Birds" and as private figures with respect to The New York Times. Under the punitive damage rule suggested here, plaintiffs then could not

Defining public figures with respect to media size and subject, when coupled with a rule that punitive damages are unconstitutional in the ordinary public figure or public official case, accomplishes two desired results. First, it allows the media maximum freedom from the chilling effects of punitive damages when they report on the affairs of public figures and officials. The large national media, however, will be protected from punitive damages only when they cover the affairs of those public figures who are truly nationally known. Thus the potential for media conglomerates to abuse their power is held in check by the threat of punitive damages if they stray from the field of national interest. Second, the rules suggested here give small media additional protection by classifying locally prominent persons as public figures, thus barring their recovery of punitive damages absent an intent to injure. Since small media will play an increasingly important role in the circulation of diverse opinion, this solution is consistent with the first amendment policy of fostering "uninhibited, robust, and wide-open"[270] public debate.

IV. CONCLUSION

The conflicting interests involved in the award of punitive damages for libel may be balanced by restricting their award to private figure cases,[271] except in the rare case where a publisher intends to harm the plaintiff with the knowing or reckless publication of defamatory falsehoods.[272] This would allow the media maximum freedom when covering public figures and public officials, the plaintiffs who are most often involved in important public debate. Furthermore, if public figures are defined with respect to the circulation and specialized topic covered by the defendant media outlet, persons who could not command national attention but who had achieved prominence in local affairs, would be classified as public figures if they were libeled by the local small media. Since punitive damages would be severely restricted in public figure cases, the end result would be greater protection for small media.[273]

Punitive damages should not, however, be abandoned in all public figure and public official cases. They should be restricted to those few cases where the plaintiff can prove that the publisher circulated defamatory falsehood with a spiteful intent to injure the plaintiff's reputation.[274] Only in such a case is the deterrent function of punitive damages a legitimate state interest.[275] Thus, a showing of intent to injure the plaintiff's reputation should be required in addition to the *New York Times* liability requirements before punitive damages are awarded to public figures or public officials.

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recover a punitive award against the small media defendant "American Birds" absent an intent to harm. But if they could show that The New York Times had libeled them with knowing falsity or reckless disregard of the truth, they could recover punitive damages as private figures.

270. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

271. See pt. II(A) supra.

272. See pt. II(C) supra.

273. See pt. III(B) supra.

274. See pt. III(C)(1) supra.

275. See pt. III(C)(2) supra.

One caveat must be added. If restrictions on the award of punitive damages in public figure and public official cases are to be effective, the jury must be prevented from using the common-law presumption of damages[276] to return an award which is punitive in nature but compensatory in name. It is clear from a number of cases that presumed "actual" damages often play a role indistinguishable from those of punitive damages.[277] As early as 1899 Justice Peckham wrote that in libel cases "the line between compensatory and punitive damages is quite vague . . . ."[278] Cases may be found which treat the concepts of punitive and compensatory damages interchangeably.[279] Thus even if punitive damages were prohibited on constitutional grounds, an award of presumed damages by a jury reacting to unpopular opinion would frequently be affirmed.[280]

The common-law rule of presumed damages has been of central concern in the Supreme Court's attempt to promote the policies of the first amendment. In *New York Times* the Court clearly disapproved of the fact that a $500,000 verdict had been returned by a jury which had seen no evidence of actual injury.[281] But the Court did not disturb the common-law presumption until a

276. See notes 16-18 supra and accompanying text.

277. One of the most striking examples is a case in which the same facts were tried before three different juries in three different counties. Only two of the juries were instructed that they could award punitive damages, yet all three juries returned identical damage verdicts of $4,500. See Bass v. Chicago & N.W. Ry., 36 Wis. 450 (1874); 39 Wis. 636 (1876); 42 Wis. 654, 671-72 (1877). One interpretation is that the punitive damages awarded by the first and third juries were awarded in the guise of compensatory damages by the second. See also Farrar v. Tribune Publishing Co., 57 Wash. 2d 549, 358 P.2d 792 (1961) (en banc), where the court allowed evidence of lack of malice to be admitted to mitigate damages even though Washington is one of the states which does not recognize the doctrine of punitive damages. 57 Wash. 2d at 556-57, 358 P.2d at 796-97. A dissent argued that only punitive damages can be mitigated by a showing of good faith. 57 Wash. 2d at 562, 358 P.2d at 800 (dissenting opinion). Apparently the majority believed compensatory damages might be used for punishment by the jury.

278. Washington Gas Light Co. v. Lansden, 172 U.S. 534, 555 (1899). Justice Peckham was not convinced that a jury would be prevented from punishing the defendant with an award of damages merely because the trial judge had instructed that a punitive damage verdict could not be returned. He concluded that if a jury was intent on punishing the defendant, it had sufficient tools to accomplish its end with the presumption of injury. See id.

279. See Hotchner v. Castillo-Puche, Civil No. 74-5516 (S.D.N.Y., July 30, 1976), rev'd on other grounds, Civil No. 76-7479 (2d Cir., March 23, 1977), where to justify a large punitive damage verdict based on only one dollar in compensatory damages, the court simply concluded that the jury "[u]ndoubtedly . . . intended the punitive award to do double duty . . . ." Id. at 5.

280. Such a result is possible in states where punitive damages have been held unconstitutional in libel actions but the common-law presumption of conpensatory damages has been allowed to remain. See Taskett v. King Broadcasting Co., 86 Wash. 2d 439, ——, 546 P.2d 81, 86 (1976) (en banc); Sprouse v. Clay Communication, Inc., 211 S.E.2d 674, 692-93 (W. Va.), cert. denied, 423 U.S. 882 (1975). In the Sprouse case $250,000 in "actual damages" was upheld although no proof in dollar amounts was offered because it was assumed a plaintiff with this "rank and station in life" must have suffered that much emotional damage. Id.

281. See 376 U.S. at 270-77. Large compensatory awards, of course, have as much deterrent effect as large punitive damage awards. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 83 (1971) (Marshall, J., dissenting); Stevenson v. Hearst Consol. Publications, Inc., 214 F.2d 902, 908 n.2

labor dispute case,[282] in which it required that proof of injury must be offered before any recovery of damages for libel could be granted.[283] These cases led a number of lower courts to conclude that the first amendment prohibited juries from presuming damages in libel.[284] Other courts, however, rejected such a notion.[285] Finally, in *Gertz*, the Supreme Court held that in private figure cases, at least when the *New York Times* test is not satisfied, there must be "competent evidence" of "actual injury" before damages will be awarded.[286] This rule prevents a jury from awarding damages which are punitive in nature although labeled compensatory.[287] If constitutional restrictions on the award of punitive damages are to be successful, the rule in *Gertz*

(2d Cir.), cert. denied, 348 U.S. 874 (1954). The mere fact that compensatory damages are taken from the defendant gives them an "admonitory function." Morris, supra note 92, at 1177. In reducing grossly excessive compensatory verdicts in libel cases, courts occasionally intimate that the jury was using the verdict for punishment. See Walker v. Associated Press, 191 So. 2d 727, 739 (La. Ct. App. 1966), rev'd on other grounds, 389 U.S. 28 (1967).

282. Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966). The Court required proof of actual injury but provided no discussion of the policy behind establishing such a rule. Id. at 64-65.

283. Id. It was also apparent that the holding would be limited to libels committed during the course of labor disputes, where Congress and the courts have taken extra pains to ensure debate continues unrestrained. Branch 496, Letter Carriers v. Austin, 418 U.S. 264, 270-72 (1974); Linn v. Plant Guard Workers Local 114, 383 U.S. 53, 60-63 (1966); see Cafeteria Local 302 v. Angelos, 320 U.S. 293, 295 (1943). See also the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(2) (1970), which guarantees the right of union members to voice their opinions at meetings.

284. See Suchomel v. Suburban Life Newspapers, Inc., 84 Ill. App. 2d 239, 228 N.E.2d 172 (1967), aff'd on other grounds, 40 Ill. 2d 32, 240 N.E.2d 1 (1968); Lundstrom v. Winnebago Newspapers, Inc., 58 Ill. App. 2d 33, 206 N.E.2d 525 (1965); cf. McNabb v. Tennessean Newspapers, Inc., 55 Tenn. App. 380, 400 S.W.2d 871 (1965) (en banc).

285. Goldwater v. Ginzburg, 414 F.2d 324, 340 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970); Indianapolis Newspapers, Inc. v. Fields, 254 Ind. 219, 256-57, 259 N.E.2d 651, 667-68, cert. denied, 400 U.S. 930 (1970); Fox v. Kahn, 421 Pa. 563, 569, 221 A.2d 181, 184, cert. denied, 385 U.S. 935 (1966).

286. 418 U.S. at 350. Prosser lists two additional reasons why libel damages should be limited to actual injury. It would "go far to do away with the genuine evils of the petty spite suit for trivial utterances, and the serious abuse of the action of defamation as a weapon of extortion." Prosser, supra note 15, § 112, at 765.

287. Some authorities, however, would dispute this assertion on the ground that by including mental anguish and suffering in the list of actual injury in Gertz, the Supreme Court defeated the very principles it sought to protect. See Eaton, supra note 12, at 1436; Comment, Defamation Law in the Wake of Gertz v. Robert Welch, Inc.: The Impact on State Law and the First Amendment, 69 Nw. U.L. Rev. 960, 982 (1975); Note, Federalization of State Defamation Law, 15 Washburn L.J. 290, 304 (1976); cf. Developments, supra note 21, at 138-39.

It has been suggested that the mental distress damage category provides a "formidable weapon" to a jury inclined to punish unpopular opinion, Gertz v. Robert Welch, Inc., 418 U.S. 323, 367 (1974) (Brennan, J., dissenting), and that it is a return to the common-law rule of presumed damages, Time, Inc. v. Firestone, 424 U.S. 448, 475 n.3 (1976) (Brennan, J., dissenting); see Robertson, supra note 11, at 232. One court concluded mental distress damages give a blessing to

requiring proof of actual injury should be extended to public figure and public official cases.[288]

Dissatisfaction with punitive damages in libel actions has been growing recently in courts not only in the United States but also in England.[289] A committee reporting to the British Parliament has recommended legislation which would abolish punitive damages in libel actions.[290] The committee

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"capricious jury verdicts." AAFCO Heating & Air Conditioning Co. v. Northwest Publishing, Inc., 321 N.E.2d 580, 589 (Ind. Ct. App. 1974), cert. denied, 424 U.S. 913 (1976).

Apparently the drafters of the Restatement immediately preceding Gertz had anticipated the Court would declare that damages such as mental distress were unconstitutional because "they are not subject to specific measurement and are therefore not subject to adequate court control . . . ." See Restatement (Second) of Torts, Explanatory Notes § 621, comment b at 287 (Tent. Draft. No. 20, 1974). Perhaps because it realized that juries might use the mental suffering category to award damages punitive in nature, the Massachusetts court which held punitive damages unconstitutional in libel actions also required that trial and appeals judges exercise "a special duty of vigilance in charging juries and reviewing verdicts to see that damages are no more than compensatory." Stone v. Essex County Newspapers, Inc., ——Mass.——, 330 N.E.2d 161, 170 (1975).

Justice Brennan also suggested that the inclusion of mental distress in the category of actual injury would in most cases present an issue of triable fact and thus remove the remedy of a summary judgment for publishers wishing to dispose of a libel suit without the expense of extended litigation. The net result would be a greater chilling effect because of the fear of large litigation costs. Time, Inc. v. Firestone, 424 U.S. 448, 475 n.3 (1976) (Brennan, J., dissenting); accord, Anderson v. Stanco Sports Library, Inc., 542 F.2d 638, 641 (4th Cir. 1976).

But in spite of this criticism of the mental distress category, Gertz still provides more protection than did the common law. Gertz requires competent evidence on the issue of mental suffering. See 418 U.S. at 350. Thus, in Time, Inc. v. Firestone, 424 U.S. 448, 460-61 n.6 (1976), a jury verdict of $100,000 for emotional distress was upheld, but it was supported by evidence from at least five witnesses including a physician who had prescribed a sedative for the plaintiff. Such a rule, if adopted in public figure and public official cases, would significantly reduce the discretion vested in a jury to use common-law compensatory damages to return a verdict punitive in nature.

288. The Supreme Court of Alabama considered the arguments made in Gertz against the common-law presumption of damages so compelling that it held there must be proof of actual injury in public official as well as private figure cases. Bryan v. Brown, 339 So. 2d 577, 583-84 (Ala. 1976).

289. See Broome v. Cassell & Co., [1972] A.C. 1027, 1087, where Lord Reid wrote: "To allow pure punishment [through punitive damages in libel cases] contravenes almost every principle which has been evolved for the protection of offenders. . . . There is no limit to the punishment except that it must not be unreasonable. The punishment is not inflicted by a judge who has experience and at least tries not to be influenced by emotion: it is inflicted by a jury without experience of law or punishment and often swayed by considerations which every judge would put out of his mind. . . . It is no excuse to say that we need not waste sympathy on people who behave outrageously. Are we wasting sympathy on vicious criminals when we insist on proper legal safeguards for them?"

The reasoning used in American cases that punitive damages stifle free speech would apparently not appeal to Lord Reid, who rejected an argument that "to allow punitive damages . . . would hamper other publishers or limit their freedom to conduct their business . . . ." Id. at 1088-89.

290. Report of the Committee on Defamation, Cmnd. 5909, at 94-7 (1975). This report was

reached its conclusion largely on the grounds that punitive damages are arbitrary and fulfill no essential function in libel law.[291] The case for abolishing punitive damages in public figure and public official cases, or at least restricting their award to cases of flagrant abuse of the right of publication, is far more compelling in the United States where the right of free public debate enjoys the privileged protection of the first amendment.

Nicholas J. Jollymore

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critically noted in 39 Modern L. Rev. 187 (1976), mainly on the ground that the abolition of punitive damages would remove the only deterrent to "the occasional defendant who will make sufficient profit from a scandalous book to be able to snap his fingers at a defamation action." Id. at 193.

291. Report of the Committee on Defamation, Cmnd. 5909, at 96 (1975). The Committee concluded punitive damages were unnecessary, especially since English law allows "aggravated compensatory damages." Id. In such a case the English law parallels the American law in cases where common-law malice is required as a condition to the award of punitive damages.